DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-515
Title: Michigan, Petitioner
v.
Bay Mills Indian Community, et al.
Docketed: October 25, 2012
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (11-1413)
Decision Date: August 15, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 23 2012	Petition for a writ of certiorari filed. (Response due November 26, 2012)
Nov 3 2012	Waiver of right of respondent Little Traverse Bay Bands of Odawa Indians to respond filed.
Nov 26 2012	Brief of respondent Bay Mills Indian Community in opposition filed.
Dec 6 2012	Reply of petitioner Michigan filed.
Dec 12 2012	DISTRIBUTED for Conference of January 4, 2013.
Jan 7 2013	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 14 2013	Brief amicus curiae of United States filed.
May 24 2013	Supplemental brief of petitioner Michigan filed.
May 28 2013	DISTRIBUTED for Conference of June 13, 2013.
Jun 17 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 24 2013	Petition GRANTED.
Jul 26 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 30, 2013.
Jul 26 2013	The time to file respondent's brief on the merits is extended to and including October 24, 2013.
Aug 30 2013	Joint appendix filed. (Statement of costs filed)
Aug 30 2013	Brief of petitioner Michigan filed.
Sep 6 2013	Brief amicus curiae of State of Oklahoma filed.
Sep 6 2013	Brief amici curiae of Alabama, et al. filed.
Sep 17 2013	SET FOR ARGUMENT ON Monday, December 2, 2013.
Sep 17 2013	CIRCULATED
Sep 19 2013	Record from U.S.C.A. for 6th Circuit is electronic.
Sep 19 2013	Record from U.S.D.C. for Western District of Michigan is electronic.

Oct 17 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Oct 22 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Oct 24 2013	Brief of respondent Bay Mills Indian Community filed. (Distributed)
Oct 24 2013	Letter proposing a lodging of a copy of arguments and decision in the Supreme Court of the District of Columbia in Chadick v. Duncan, No.15,317 (D.C. March 2, 1894) received from counsel for the respondent. (Distributed)
Oct 31 2013	Brief amicus curiae of United States filed. (Distributed)
Oct 31 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 31 2013	Brief amici curiae of National Congress of American Indians, et al. filed. (Distributed)
Oct 31 2013	Brief amici curiae of Seminole Tribe of Florida, et al. filed. (Distributed)
Oct 31 2013	Brief amici curiae of Scholars of American Indian Law filed. (Distributed)
Nov 5 2013	Consent to the filing of amicus curiae briefs in support of either party or neither party received from respondent Little Traverse Bay Bands of Odawa Indians.
Nov 18 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 22 2013	Reply of petitioner Michigan filed. (Distributed)
Dec 2 2013	Argued. For petitioner: John J. Bursch, Michigan Solicitor General, Lansing, Mich. For respondents: Neal Kumar Katyal, Washington, D. C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

12-515

No. _____

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA), authorizes an Indian tribe to conduct class III gaming under limited circumstances and only on "Indian lands." 25 U.S.C. § 2710(d)(1). This dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino located *off* of "Indian lands." The petition presents two recurring questions of jurisprudential significance that have divided the circuits:

1. Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands.

2. Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the State of Michigan. Respondent is the Bay Mills Indian Community, a federally recognized Indian tribe. Appellee below but not appearing here is the Little Traverse Bay Band of Odawa Indians, a federally recognized Indian tribe.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
INTRODUCTION 2
STATEMENT OF THE CASE 3
A. The Bay Mills casino 3
B. Proceedings in the district court 4
C. Sixth Circuit ruling 6
REASONS FOR GRANTING THE PETITION 7
I. The petition should be granted to resolve a circuit conflict regarding federal-court jurisdiction when a tribe violates its IGRA gaming compact. 7
II. The petition should be granted to resolve a circuit conflict regarding tribal immunity from a suit claiming an IGRA violation. 13
III. The issues presented are of national importance, implicating allocations of authority and sovereignty between states and tribes. 15
CONCLUSION 18

PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals,
Opinion,
Issued August 15, 2012 ..... 1a-18a

United States District Court,
Western District of Michigan,
Opinion and Order,
Granting Motion for
Preliminary Injunction,
Issued March 29, 2011 ..... 19a-39a

United States District Court,
Western District of Michigan,
Answer to Amended Complaint
Filed September 30, 2011 ..... 40a-54a

United States District Court,
Western District of Michigan
Amended Complaint
Filed August 09, 2011 ..... 55a-72a

Exhibit A 73a-96a
Exhibit B 97a-100a
Exhibit C 101a-170a

TABLE OF AUTHORITIES

Page

Cases

Cabazon Band of Mission Indians v. *Wilson*,
124 F.3d 1050 (9th Cir. 1997) 10

Crosby Lodge, Inc. v. *National Indian Gaming Association*,
2007 WL 2318581, at *4 (D. Nev. Aug. 10, 2007) 16

Davids v. *Coyhis*,
869 F. Supp. 1401 (E.D. Wis. 1994) 16

Ex parte Young,
209 U.S. 123 (1908) 16, 17

Florida v. *Seminole Tribe of Florida*,
181 F.3d 1237 (11th Cir. 1999) 14

Free Enterprise Fund v. *Public Company Accounting Oversight Board*,
130 S. Ct. 3138 (2010) 9, 10

Lewis v. *Norton*,
424 F.3d 959 (9th Cir. 2005) 13

Merrell Dow Pharm. Inc. v. *Thompson*,
478 U.S. 804 (1986) 10

Mescalero Apache Tribe v. *New Mexico*,
131 F.3d 1379 (10th Cir. 1997) 11, 13, 14

Mims v. *Arrow Fin. Servs., LLC*,
132 S. Ct. 740 (2012) 9

New Mexico v. *Pueblo of Pojoaque*,
30 Fed. App'x 768 (10th Cir. 2002) 14

Pueblo of Santa Ana v. *Kelly*,
104 F.3d 1546 (10th Cir. 1997) 11

Tamiami Development Corp. v. *Miccosukee Tribe of Florida*,
177 F.3d 1212 (11th Cir. 1999) 16

Verizon Md., Inc. v. *Public Serv. Comm'n of Md.*,
535 U.S. 635 (2002) 9

Wisconsin v. *Ho-Chunk Nation*,
512 F.3d 921 (7th Cir. 2008) 14

Statutes

25 U.S.C. § 2701 *et seq.* ..... passim

25 U.S.C. § 2703(4) 12

25 U.S.C. § 2710 ..... passim

25 U.S.C. § 2710(d)(1) ..... i, 15

25 U.S.C. § 2710(d)(3)(C) 14

25 U.S.C. § 2710(d)(7)(A)(ii) ..... passim

25 U.S.C. § 2710(d)(7)(A)(i–iii) 10

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 ..... passim

28 U.S.C. § 1362 8

28 U.S.C. § 1367 5

28 U.S.C. § 2201 5

OPINIONS BELOW

The opinion of the Sixth Circuit court of appeals, App. 1a–18a, is reported at __ F.3d __, 2012 WL 3326596. The opinion of the district court, App. 19a–39a, is not reported.

JURISDICTION

The judgment of the Sixth Circuit was entered on August 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

25 U.S.C. § 2710(d)(7)(A)(ii):

> (7)(A) The United States district courts shall have jurisdiction over—
>
> > (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect . . . .

INTRODUCTION

This case involves a pair of recurring and widening circuit splits concerning a federal court's authority to hear, and a tribe's sovereign immunity from, disputes under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (IGRA). The Sixth Circuit ruled that an Indian tribe has immunity and a federal court lacks jurisdiction to enjoin the tribe's operation of an illegal, off-reservation casino, i.e., located outside "Indian lands" as IGRA defines that term. The Sixth Circuit reached the anti-intuitive conclusion that while Congress intended in IGRA to allow a state to obtain a federal-court injunction when a tribe operates an illegal casino *on* Indian lands, a state may not sue a tribe in federal court for violating an IGRA-governed compact by operating the same illegal casino *off* Indian lands.

The first question is whether the federal courts have jurisdiction over such a dispute. The Sixth Circuit said no, relying on 25 U.S.C. § 2710(d)(7)(A)(ii), which admittedly states that a federal court has jurisdiction to enjoin a class III gaming activity "located *on* Indian lands." App. 9a (emphasis added). What the Sixth Circuit ignored is 28 U.S.C. § 1331, which grants federal-court jurisdiction over *all* civil actions arising under the laws of the United States, presumably including those actions arising under IGRA (such as whether a tribe has violated IGRA by breaching its compact with a state). The Sixth Circuit's decision conflicts with decisions of the Ninth and Tenth Circuits, which take a much broader view of federal-court jurisdiction to resolve disputes under IGRA than does the Sixth Circuit.

The second question is whether Indian tribes have sovereign immunity from suits alleging IGRA violations. The Sixth Circuit said yes, rejecting Michigan's argument that Congress abrogated tribal immunity under § 2710(d)(7)(A)(ii). In so holding, the Sixth Circuit acknowledged a conflict with the Tenth Circuit, then aligned itself with the Eleventh Circuit in rejecting the Tenth Circuit's "muddled" reasoning. App. 13a. But under the Eleventh Circuit's view of tribal immunity, Michigan's lawsuit would likely have been allowed to proceed. And the same is true under the Seventh Circuit's precedent describing the scope of tribal immunity, a view which differs from all three of the aforementioned circuits.

These two circuit splits present jurisprudential issues of great significance to Michigan as well as other states and tribes across the country. Ignoring the circuit splits allows entirely different allocations of authority and sovereignty between states and tribes, dependent solely on the federal circuit where the parties happen to be located. In addition, allowing the Sixth Circuit decision to stand invites the proliferation of off-reservation tribal casinos that violate federal law, i.e., IGRA. The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. The Bay Mills casino

Bay Mills is a federally recognized Indian tribe with a reservation in Michigan's Upper Peninsula in Chippewa County, near the town of Brimley. App. 3a. The Tribe's offices are located on the reservation.

In 1993, Bay Mills entered into a Tribal-State Compact with Michigan—a compact governed by IGRA—and thereafter opened and has continuously operated at least one casino on its reservation. As IGRA requires, Bay Mills also adopted a Gaming Ordinance that was approved by the National Indian Gaming Commission. App. 4a. The Gaming Ordinance created a Tribal Gaming Commission charged with regulating all casinos the Tribe owned, including issuing licenses to those casinos. App. 15a. Both the Compact and the Gaming Ordinance prohibited the Tribe from operating a casino outside of Indian lands. App. 5a, 15a.

On October 29, 2010, the Tribal Gaming Commission issued a license to the Tribe to open a new, off-reservation casino on property the Tribe owned near Vanderbilt, Michigan, approximately 100 miles from its reservation. The Tribe opened the casino on November 3, 2010, even though it had not obtained confirmation from either the United States Department of the Interior or the National Indian Gaming Commission that the Vanderbilt property was eligible for casino gaming.

B. Proceedings in the district court

On December 16, 2010, the Michigan Attorney General sent a letter to Bay Mills ordering it to immediately close the casino because it violated state gaming laws. Bay Mills refused, so the State filed this lawsuit on December 21, 2010, seeking to enjoin any further operation of the casino. The State alleged in its Complaint that the court had jurisdiction under 28 U.S.C. § 1331, federal common law, IGRA 25 U.S.C.

§ 2701 *et seq.*, 25 U.S.C. § 2710(d)(7)(A)(ii), 28 U.S.C. § 1367, and 28 U.S.C. § 2201. A short time later, the Little Traverse Bay Bands of Odawa Indians, another federally recognized Indian tribe, filed its own lawsuit against Bay Mills, seeking an injunction against further operation of the Vanderbilt casino. The district court consolidated the two lawsuits. Within hours of these filings, both the Department of the Interior and the National Indian Gaming Commission issued letters formally determining that the Vanderbilt casino was *not* located on Indian lands as defined by IGRA. Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to Michael Gross, Associate General Counsel, National Indian Gaming Commission (Dec. 21, 2010); Memorandum from Michael Gross (Dec. 21, 2010).

The Little Traverse Bay Bands also filed a motion for a preliminary injunction that asked the trial court to enjoin further operation of the Vanderbilt casino. The State supported the motion, and the district court granted it on March 29, 2011.

The district court began its opinion by addressing its jurisdiction. Although § 2710(d)(7)(A)(ii) authorizes a district court to enjoin class III gaming activity "located on Indian land" (and in violation of a compact), the district court recognized its broad subject-matter jurisdiction under 28 U.S.C. § 1331 to resolve *any* civil action arising under federal law. App. 25a. Though not dispositive, the district court also noted that Bay Mills had, in 1999, successfully made the exact same § 2710 request for injunctive relief against another tribe. App. 26a. Concluding the relevant property was not "Indian land" as a matter of federal law, the court enjoined Bay Mills' operation of its Vanderbilt casino. App. 27a.

C. Sixth Circuit ruling

Bay Mills appealed, and the Sixth Circuit vacated the injunction, ruling that the federal courts lacked jurisdiction to enjoin Bay Mills from illegal gaming outside Indian lands, and that Bay Mills was immune from the State's common-law and other statutory claims.

With respect to jurisdiction over Michigan's IGRA claims, the Sixth Circuit declined to apply § 1331. Rather, it looked simply to § 2710 and concluded that the provision did not apply because Michigan alleged that illegal gaming was taking place off reservation, not *on* Indian lands. App. 9a.

Consistent with the narrow scope it had just ascribed to § 2710, the Sixth Circuit also concluded that Bay Mills had sovereign immunity. App. 13a. In so holding, the Sixth Circuit purportedly aligned itself with the Eleventh Circuit and against the Tenth Circuit's view of immunity, a view that would have allowed Michigan's lawsuit here to proceed. App. 13a.

The net result of the Sixth Circuit's approach is that states may not sue in federal court to enjoin a tribe's illegal operation of an off-reservation casino.

REASONS FOR GRANTING THE PETITION

This case involves important and recurring issues of federal law involving federal-court jurisdiction and tribal sovereign immunity in the context of illegal tribal gaming that violates IGRA. As the court of appeals noted below, there is a disagreement among the federal circuits over whether § 1331 vests federal courts with jurisdiction over IGRA claims regardless of 25 U.S.C. § 2710(d)(7)(A)(ii). There is also considerable disagreement among the circuits concerning the scope of tribal sovereign immunity from suits seeking to enjoin unlawful gaming. This Court's clarification of these issues is sorely needed.

I. The petition should be granted to resolve a circuit conflict regarding federal-court jurisdiction when a tribe violates its IGRA gaming compact.

Section 2710(d)(7)(A)(ii) says that the United States district courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." The Sixth Circuit interpreted § 2710 as exclusionary, *withdrawing* federal-court jurisdiction over any tribal gaming dispute that does not satisfy what the Sixth Circuit characterized as § 2710(d)(7)(A)(ii)'s "five prerequisites":

> (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.

App. 7a. Because Michigan's claim involved an illegal gaming operation *off* Indian lands, the Sixth Circuit reasoned, prerequisite "3" was missing, and the federal courts lacked jurisdiction. App. 7–8a.

But § 2710 is only one of the jurisdictional bases that Michigan and Little Traverse Bay Bands identified in their complaints. Both actions turned on two distinct federal questions: (1) whether Bay Mills had violated IGRA by allegedly breaching its compact with the State of Michigan, and (2) whether lands purchased with earnings from the Michigan Indian Land Claims Settlement Act, Pub. L. 105–143, 111 Stat. 2652, constitute "Indian lands" for purposes of IGRA. Such federal questions are easily encompassed by Congress's general grant of federal-court jurisdiction. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States.").[1] And nothing in § 2710 purports to strip away federal-question jurisdiction.

---

[1] The district court also had jurisdiction over a civil action "brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the controversy arises" under federal law. 28 U.S.C. § 1362. As the district court noted, "Little Traverse Bay is such a tribe." App. 25a.

This Court has protected § 1331's integrity in analogous situations. For example, in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), plaintiffs challenged in federal district court the Sarbanes-Oxley Act's creation of the Public Company Accounting Oversight Board. But the Act, in § 78y, provided plaintiffs the opportunity to bring such an action in a court of appeals. The federal government interpreted § 78y as the exclusive route to review. But this Court rejected that position because § 78y's text "does not expressly limit the jurisdiction that other statutes confer on district courts. See, e.g., 28 U.S.C. §§ 1331, 2201." *Id.* at 3150. "Provisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure." *Id.* (quotation omitted). See also *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 643 (2002) ("[N]othing in 47 U.S.C. § 252(e)(6) purports to strip this [§ 1331] jurisdiction."); cf. *Mims* v. *Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 749–50 (2012) (rejecting the argument that a federal statute created exclusive state-court jurisdiction where nothing in the statute's language "purports to oust federal courts of their 28 U.S.C. § 1331 jurisdiction").

Here, there is nothing in § 2710's plain language that suggests Congress intended to oust federal courts of their § 1331 jurisdiction over illegal tribal casinos simply because the casinos are located off reservation. Congress simply intended to make clear that federal courts have the power to enjoin illegal casinos, even when operated by sovereign Indian tribes.

The Sixth Circuit's contrary conclusion runs counter to *Free Enterprise Fund* and conflicts directly with the Ninth Circuit's conclusion in *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997). There, several tribes sued California to force the state to remit amounts it had collected as license fees from horse racing associations that had received payments pursuant to an off-track betting regime established in a compact between the state and the tribes. That compact also included a provision obligating the state to turn the money over to the tribes if a federal court determined that the payments were illegal. A court made that determination, but the state refused to remit the money to the tribes, who then sued.

Mirroring the Sixth Circuit's logic here, California argued that the federal courts did not have jurisdiction because § 2710(d)(7)(A)(i–iii) conferred jurisdiction in only limited circumstances, and the tribes' lawsuit did not satisfy the prerequisites. The Ninth Circuit rejected California's position. 124 F.3d at 1056. Noting "the importance of the federal issue in federal-question jurisdiction" under § 1331, *id.* (quoting *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 814 n.12 (1986)), the Ninth Circuit agreed with the tribes that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Id.*

In sum, the Ninth Circuit recognized that gaming compacts are central to IGRA's structure, and that such compacts will be meaningless if the parties cannot be held in court to honor their promises. Here, Bay Mills breached the parties' compact (and thus violated

IGRA) by opening an off-reservation casino that the compact does not allow. If the Ninth Circuit were evaluating Michigan's claim, there can be little doubt that the court would allow the action to proceed in a federal forum.

The Sixth Circuit's decision here also conflicts with the Tenth Circuit's opinion in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997). There, New Mexico brought a § 2710(d)(7)(a)(ii) counterclaim alleging that the Tribal-State compact at issue was invalid because New Mexico's governor did not have authority to sign it. Again mirroring the Sixth Circuit's logic here, the Mescalero Apache Tribe argued that the federal court lacked jurisdiction.

Relying on its previous decision in *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997), the Tenth Circuit concluded that it had jurisdiction to answer the question of compact validity. *Mescalero*, 131 F.3d at 1386. And the Tenth Circuit's reasoning stands in stark contrast to the Sixth Circuit's analysis here: "IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court." *Pueblo of Santa Ana*, 104 F.3d at 1557.

If the Tenth Circuit were evaluating Michigan's claim, it would also likely allow this dispute to proceed. The action undeniably involves federal questions under IGRA and the Michigan Indian Land Claims Settlement Act. Accordingly, 28 U.S.C. § 1331 vests the federal courts with jurisdiction.

Conversely, if the Sixth Circuit were evaluating the claim in *Mescalero*, it would have denied a federal

forum. Because New Mexico alleged that the parties' compact was not in effect, it would fail Sixth Circuit prerequisite "5" for jurisdiction under § 2710. This Court should not allow such starkly different outcomes depending on nothing more than the *locus* of the case. There is an imminent need to resolve the disagreement among the circuits concerning the scope of federal-court jurisdiction to remedy IGRA violations.

Michigan notes that the Sixth Circuit should have recognized federal-court jurisdiction even under its view that § 2710 somehow takes away the general jurisdiction that § 1331 grants. Michigan alleged in its complaint several "class III gaming activities" that *did* occur on Indian lands, such as the Tribe's licensing of the off-reservation casino and the Tribe's on-going supervision of the casino's operations. App. 59a, ¶¶ 19, 21. The Tribe, through its Executive Council, derives its governmental authority from its reservation. See Constitution and Bylaws of the Bay Mills Indian Community, art. II, § 1. Since a tribe's reservation constitutes "Indian lands" under 25 U.S.C. § 2703(4), authorizing, licensing, and operating an off-reservation casino from the reservation satisfied even the Sixth Circuit's jurisdictional requirements.

Such a conclusion is consistent with congressional intent. Logically, Congress would not have limited federal-court authority to enjoining just gaming itself; conduct that is inextricably linked to class III gaming, such as decisions that make the gaming possible, falls naturally within the broader ambit of gaming "activity" and should be subject to a federal court's jurisdiction and equitable power.

II. The petition should be granted to resolve a circuit conflict regarding tribal immunity from a suit claiming an IGRA violation.

The second question presented involves the scope of Congress's abrogation of tribal immunity through IGRA's enactment. And here, the circuit conflict is even deeper than that regarding federal-court jurisdiction.

The Sixth Circuit observed that § 2710(d)(7)(A)(ii) "supplies federal jurisdiction and abrogates tribal immunity." App. 13a. But again, because this dispute does not involve illegal gaming "on" Indian lands (perquisite "3", according to the panel), the Sixth Circuit said that § 2710 could not apply. App. 9a.

In so holding, the Sixth Circuit acknowledged that it was furthering a circuit split. "It is true, as the plaintiffs point out, that the Tenth Circuit has taken the opposite approach with respect to abrogation of tribal immunity under § 2710(d)(7)(A)(ii)." App. 13a (citing *Mescalero*, 131 F.3d at 1385–86). The Tenth Circuit (followed by the Ninth) has held that "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Mescalero*, 131 F.3d at 1385–86; accord *Lewis* v. *Norton*, 424 F.3d 959, 962–63 (9th Cir. 2005) ("The IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue.") (citing *Mescalero*). Michigan's claim here falls comfortably within the scope of these Ninth and Tenth Circuit rulings.

But the Sixth Circuit ultimately aligned itself with the Eleventh Circuit, which rejected *Mescalero* and maligned its reasoning as "muddled." App. 13a (citing *Florida* v. *Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999)). According to the Eleventh Circuit, "Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact." *Seminole Tribe*, 181 F.3d at 1242.

The circuit conflict is actually deeper than even the Sixth Circuit appreciated. To begin, the Eleventh Circuit's ruling in *Seminole Tribe* creates a narrower tribal immunity than does the Sixth Circuit's opinion here. Given that Bay Mills' operation of its illegal off-reservation casino violates the express terms of its Michigan compact (which only authorizes gaming on "Indian lands"), even the Eleventh Circuit appears likely to have allowed Michigan's action to proceed.

In addition, the Seventh Circuit has extended the abrogation of tribal sovereign immunity to *any* claim alleging a violation of a gaming compact arising from the subjects of compact negotiation listed in § 2710(d)(3)(C). *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008). Although that ruling did not allow Wisconsin to enforce revenue-sharing agreements entered into in conjunction with a Tribal-State compact, contra *New Mexico* v. *Pueblo of Pojoaque*, 30 Fed. App'x 768 (10th Cir. 2002) (allowing such a suit to proceed), its scope would nevertheless allow Michigan's claim that Bay Mills is violating its compact here.

In sum, tribal immunity under IGRA depends entirely on the circuit making the decision. Certiorari is warranted.

Of course, as noted above, there were other class III gaming activities (such as licensing and ongoing supervision of casino operations) that Michigan alleged in its Complaint and that undeniably took place on Indian lands—the Bay Mills reservation itself. Thus, even were the Court to adopt the Sixth Circuit's approach, rather than that of the Seventh, the Ninth and Tenth, or the Eleventh, the Sixth Circuit should be reversed, and the district court's grant of an injunction against Bay Mills should be sustained.

III. The issues presented are of national importance, implicating allocations of authority and sovereignty between states and tribes.

Having concluded that the federal courts lacked jurisdiction and that Bay Mills had sovereign immunity, the Sixth Circuit did not reach the question of whether the Vanderbilt tract qualifies as "Indian lands" eligible under 25 U.S.C. § 2710(d)(1) for class III gaming. The district court analyzed this issue at length and held that the tract does not constitute "Indian lands," App. 29a–38a, consistent with the views of the Department of the Interior and the National Indian Gaming Commission. Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to Michael Gross, Associate General Counsel, National Indian Gaming Commission (Dec. 21, 2010); Memorandum from Michael Gross (Dec. 21, 2010). There can be no reasonable dispute that Bay Mills has an illegal casino, both under the terms of its Compact and under IGRA.

Given that fact, the Sixth Circuit's holding is remarkable: Michigan has no federal-court remedy to stop illegal tribal gaming that takes place on

Michigan's own sovereign territory, i.e., not on Indian lands. To put it another way, a state can seek to enjoin an illegal casino whenever it is located *on* reservation, but not when located *off* reservation.

That result is troubling in two respects. First, it invites tribes across the country to open off-reservation casinos, then claim immunity and lack of jurisdiction in response to any state request that a federal court enjoin the illegal conduct.

Second, the Sixth Circuit's decision encourages jurisdictional and political conflict between states and tribes. The Sixth Circuit's closing comments leave the door open to state lawsuits or criminal charges against individual Indians who participate in off-reservation gaming activities, as well as suits or charges against tribal officers. App. 17–18a. But, right or wrong, some federal courts in other jurisdictions have dismissed *Ex parte Young*-type claims alleging that a tribal official is violating IGRA. E.g., *Tamiami Partners, Ltd. Ex rel. Tamiami Development Corp.* v. *Miccosukee Tribe of Florida*, 177 F.3d 1212, 1225–26 (11th Cir. 1999) (rejecting IGRA claims against a tribal official because it "is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require the sovereign's specific performance of a contract."); *Crosby Lodge, Inc.* v. *National Indian Gaming Association*, 2007 WL 2318581, at *4 (D. Nev. Aug. 10, 2007) ("Crosby may not bring a private cause of action [asserting *Ex parte Young* relief] against Tribal Defendants for alleged non-compliance with IGRA"); *Davids* v. *Coyhis*, 869 F. Supp. 1401 (E.D. Wis. 1994) ("Congress certainly has the power to authorize civil

actions by private parties against tribal officers under the IGRA, but it has chosen not to do so. I will not take it upon myself, without a clearer direction from Congress, to permit the intrusion on tribal sovereignty that adjudication of this [*Ex parte Young*] action would present.").

And even if Michigan is successful in bringing an *Ex parte Young* action, such litigation is preordained to create friction between a state and a tribe. An *Ex parte Young* suit brought by one sovereign against another sovereign's officials has very different political ramifications than a citizen bringing such a suit against her government. (No one flinches when a Michigan citizen brings an *Ex parte Young* action against a Michigan official, but imagine the international uproar if Michigan tried to circumvent the United Kingdom's sovereign immunity by suing Prime Minister David Cameron.) Yet by closing the door to an injunction against the tribe itself, the Sixth Circuit leaves a state with no other choice when confronted with an illegal gaming operation conducted outside a reservation.

Finally, the questions of federal jurisdiction and tribal sovereign immunity under IGRA extend far beyond the case of illegal, off-reservation casinos, as exemplified by the varying contexts in which these issues have arisen in the circuits. Further delay before resolving the circuit splits at issue here will have significant implications for state and tribal sovereignty. The recurring issues this case presents warrant this Court's immediate intervention and resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: OCTOBER 2012

PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals,
Opinion,
Issued August 15, 2012 ..... 1a-18a

United States District Court,
Western District of Michigan,
Opinion and Order,
Granting Motion for
Preliminary Injunction,
Issued March 29, 2011 ..... 19a-39a

United States District Court,
Western District of Michigan,
Answer to Amended Complaint
Filed September 30, 2011 ..... 40a-54a

United States District Court,
Western District of Michigan
Amended Complaint
Filed August 09, 2011 ..... 55a-72a

Exhibit A 73a-96a
Exhibit B 97a-100a
Exhibit C 101a-170a

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 12a0265p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN
and LITTLE TRAVERSE BAY
BANDS OF ODAWA INDIANS,
Plaintiffs-Appellees,
v.
BAY MILLS INDIAN
COMMUNITY,
Defendant-Appellant.
No. 11-1413

Appeal from the United States District Court
for the Western District of Michigan
at Grand Rapids.
Nos. 1:10-cv-1273; 1:10-cv-1278—Paul Lewis Maloney, Chief District Judge.

Argued: May 31, 2012

Decided and Filed: August 15, 2012

Before: BOGGS, NORRIS, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Kathryn L. Tierney, BAY MILLS INDIAN COMMUNITY, Brimley, Michigan, for Appellant. Margaret Bettenhausen, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Conly J. Schulte, FREDERICKS, PEEBLES & MORGAN, Louisville, Colorado, for Appellees. **ON BRIEF:** Kathryn L. Tierney, Chad P. DePetro, BAY MILLS INDIAN COMMUNITY, Brimley, Michigan, for Appellant. Louis B. Reinwasser, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Conly J. Schulte, FREDERICKS, PEEBLES & MORGAN, Louisville, Colorado, John Petoskey, FREDERICKS PEEBLES & MORGAN LLP, Peshawbestown, Michigan, James A. Bransky, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, Traverse City, Michigan, for Appellees.

OPINION

KETHLEDGE, Circuit Judge. The State of Michigan and the Little Traverse Bay Bands of Odawa Indians ("Little Traverse") brought this suit to prevent the Bay Mills Indian Community from operating a small casino in Vanderbilt, Michigan. Vanderbilt itself is a small town located in the northern part of Michigan's Lower Peninsula, in forest country more than 30 miles from the nearest Great Lake. Its population, according to Census Bureau estimates, has hovered around 575 residents over the past 10 years. Little Traverse sued Bay Mills on the theory that its Vanderbilt casino (total slot machines: 84) would divert

millions of dollars of revenue from Little Traverse's vastly larger casino in Petoskey, Michigan—a high-end community located on the shores of Lake Michigan. The State sued on the more prosaic theory that the Vanderbilt casino is unlawful.

The district court entered a preliminary injunction ordering Bay Mills to stop gaming (a euphemism often unavoidable for our purposes here) at the Vanderbilt casino. We hold that the district court lacked jurisdiction over some of the plaintiffs' claims, and that Bay Mills's sovereign immunity bars the others, at least in the configuration in which the suit comes to us now. Thus we vacate the injunction.

I.

The Indian Gaming Regulatory Act ("the Regulatory Act") provides that "Class III gaming activities" (*i.e.*, casino-style gaming, as opposed to, say, bingo halls) "shall be lawful on Indian lands only if" certain requirements are met. 25 U.S.C. § 2710(d). An Indian tribe wishing to conduct gaming activity must adopt a gaming ordinance that is approved by the Chairman of the National Indian Gaming Commission ("the Gaming Commission"), *id.* § 2710(d)(1)(A)—which is itself an independent federal agency. The tribe must also negotiate with the state to enter a "Tribal-State compact" that will govern the gambling. *Id.* § 2710(d)(3). Once a compact is entered, the Regulatory Act requires the gambling to conform to the compact. *Id.* § 2710(d)(1)(C).

Bay Mills is a federally recognized Indian tribe with a reservation in Michigan's Upper Peninsula. In 1993, the tribe entered a Tribal-State compact with the

State of Michigan, pursuant to the Regulatory Act. The Gaming Commission approved Bay Mills's tribal gaming ordinance shortly thereafter. Since that time, Bay Mills has operated a casino on its reservation in Chippewa County, Michigan.

In 1997, Congress passed the Michigan Indian Land Claims Settlement Act ("the Settlement Act"), whose purpose was to allocate funds to Bay Mills and other Michigan Indian tribes, in satisfaction of judgments that the Indian Claims Commission had entered in favor of the tribes. *See* Pub. L. No. 105-143, § 102, 111 Stat. 2652. The Settlement Act directed Bay Mills to deposit a portion of its funds into a land trust, with the earnings from that trust to be "used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange." *Id.* § 107(a)(3). The Settlement Act also provided that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." *Id.*

In August of 2010, Bay Mills used trust earnings to purchase approximately 40 acres of property in Vanderbilt, Michigan. The property is located more than 100 miles from the tribe's reservation in the Upper Peninsula. Bay Mills then constructed a small casino on the property (initially with 38 electronic gaming machines, later expanded to 84), pursuant to an amended gaming ordinance. Bay Mills began operating the Vanderbilt casino on November 3, 2010.

The State filed suit against Bay Mills the following month, on December 21, 2010. Little Traverse—also a federally recognized Indian tribe—filed suit one day later. Each plaintiff claims that Bay Mills has violated

various provisions of its Tribal-State compact. The State additionally claims that Bay Mills has violated state law. Little Traverse moved for a preliminary injunction. The State supported the motion. The district court granted the motion and enjoined Bay Mills from operating the Vanderbilt casino. Bay Mills sought a stay, which the district court denied. The tribe then sought a stay in this court, which we denied.

Bay Mills now appeals the order entering the injunction.

II.

At the outset, Bay Mills argues that the plaintiffs have not shown any injury for purposes of standing. To establish standing, the plaintiffs must show an injury in fact, fairly traceable to the defendant's conduct, that is likely to be redressed by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at successive stages of the litigation." *Id.* at 561.

Little Traverse's expert predicted that the Vanderbilt casino will cause Little Traverse to lose tens of millions of dollars by diverting customers from its Odawa Casino Resort in Petoskey. The expert noted the proximity of the two properties (about 40 miles), the Vanderbilt casino's location near a major interstate, and that Bay Mills has offered incentives to new customers who show rewards cards from the Odawa resort. Bay Mills's expert identified defects in the methodology of Little Traverse's expert. But even

Bay Mills's expert acknowledged the likelihood that at least some of the Vanderbilt casino's gaming revenue would have otherwise gone to the Odawa resort.

Little Traverse's evidence of competitive harm is enough to show an injury in fact for standing purposes. This case is different from a previous one where we refused to find standing based on nothing more than the plaintiff's request that we take judicial notice of the distance between allegedly competing casinos. *See Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 915–16 (6th Cir. 2002). And because Little Traverse's Tribal-State compact requires it to furnish a portion of its gaming revenue to the State, any loss to Little Traverse will result in a loss to the State. So the State has shown injury as well.

III.

We turn to subject-matter jurisdiction. For each cause of action, federal jurisdiction "must be determined from what necessarily appears in the plaintiff's statement of his own claim . . . unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75–76 (1914); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002). We consider each of the plaintiffs' causes of action in turn.

A.

The plaintiffs primarily plead claims under the Regulatory Act, alleging that the Vanderbilt casino violates the Tribal-State compact because it is not located on Indian lands. *See* Bay Mills-Michigan

Compact § 4(H) ("The Tribe shall not conduct any Class III gaming outside of Indian lands"). These claims arise under 25 U.S.C. § 2710(d)(7)(A)(ii), which provides:

> (7)(A) The United States district courts shall have jurisdiction over—
>
> . . .
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect[.]

Two insuperable Article III defects prevent adjudication of these claims. The first is that a statutory prerequisite to jurisdiction is absent. Section 2710(d)(7)(A)(ii) by its terms is conjunctive—that is, the State or tribal plaintiff must meet *all* of the provision's conditions for jurisdiction to exist, rather than just one or two of them. Thus, § 2710(d)(7)(A)(ii) supplies federal jurisdiction only where all of the following are true: (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.

The plaintiffs' own pleadings defeat their argument that the Regulatory Act supplies jurisdiction here. In their complaints, the plaintiffs expressly allege that the Vanderbilt casino is *not* located on Indian lands, which means the plaintiffs cannot meet the third condition (that the "gaming activity [is] located on

Indian lands") recited above. *See* State's Am. Compl. ¶¶ 22, 26–28; Little Traverse's Am. Compl. ¶¶ 13, 17–18.

> The Regulatory Act defines "Indian lands" as:
>
> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). Here, the plaintiffs allege that the Vanderbilt property is not located within the Bay Mills reservation (which is located 100 miles to the north); that title to the property is not held in trust by the United States; that title is not subject to restriction against alienation by the United States; and that Bay Mills does not exercise governmental power over the property. The plaintiffs allege these things because they are essential to the plaintiffs' claim that gaming at the Vanderbilt casino violates Bay Mills's Tribal-State compact. But the allegations mean that, even at the pleading stage, the plaintiffs cannot show federal jurisdiction over their § 2710(d)(7)(A)(ii) claims. *Accord Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002) (reaching the same conclusion with respect to a claim brought under a neighboring provision of the Regulatory Act, namely § 2710(d)(7)(A)(i)).

That said, we acknowledge the irony of this case: Bay Mills, the defendant here, alleges that the Vanderbilt casino *is* located on "Indian lands"—in which case § 2710(d)(7)(A)(ii) would supply federal jurisdiction. Thus, the plaintiffs say, the district court should cut to the chase and determine whether the Vanderbilt casino is, in fact, located on Indian lands. But that leads to the second Article III defect in the plaintiffs' claims: there is no possibility of redressing their injury by means of a § 2710(d)(7)(A)(ii) claim. *See Lujan*, 504 U.S. at 561. As the case comes to us here, a determination whether the Vanderbilt casino is located on Indian lands would be purely advisory: if the Vanderbilt casino is not located on Indian lands, there is no jurisdiction for the plaintiffs' claims; if the casino is located on Indian lands, its operation does not violate the compact, which means the claims are meritless. Neither answer would redress the plaintiffs' alleged injuries.

The federal courts lack jurisdiction, therefore, to adjudicate the plaintiffs' § 2710(d)(7)(A)(ii) claims to the extent those claims are based on an allegation that the Vanderbilt casino is not on Indian lands.

B.

But each plaintiff also asserts a § 2710(d)(7)(A)(ii) claim that rests upon an alternative allegation that the Vanderbilt casino *is* located on Indian lands—thereby satisfying, as to this claim, the third prerequisite to federal jurisdiction (and the one missing for the claims above). But this claim merely exchanges one jurisdictional defect for another. The fourth prerequisite for jurisdiction under § 2710(d)(7)(A)(ii), as recited above, is that the challenged gaming is

"conducted in violation of any Tribal-State compact[.]" The compact here requires all gaming to be conducted in compliance with federal law. *See* Bay Mills-Michigan Compact § 4(C) ("The Tribe shall . . . operate . . . all Class III gaming activities pursuant to . . . [the Regulatory Act], and all other applicable federal law"). The plaintiffs argue that the Vanderbilt casino's operation violates 25 U.S.C. § 2719, which provides that "gaming regulated by this chapter shall not be conducted on lands *acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988*," subject to certain exceptions that do not apply here. (Emphasis added.) Thus, for the casino's operation to violate § 2719—and for federal jurisdiction to exist as to this claim—the casino's operations must be conducted on lands so acquired by the Secretary.

But here again the plaintiffs' own pleadings defeat their argument in support of jurisdiction. Each plaintiff affirmatively alleges that the Vanderbilt property was *not* "acquired by the Secretary in trust for the benefit of" Bay Mills. *See* State's Am. Compl. ¶ 26; Little Traverse's Am. Compl. ¶ 13. Indeed it is undisputed that the property was acquired by Bay Mills itself. Thus, we are patently without jurisdiction over this claim.

The preceding analysis knocks out all of Little Traverse's causes of action. We proceed to consider the State's remaining claims.

C.

The State pleads a claim under what it calls the "federal common law" and two claims under state law. As to these claims, the plaintiffs assert that we have

federal question jurisdiction under 28 U.S.C. § 1331. We agree. Although none of these claims are based on a federal statute, the claims "arise under" federal law because they "implicate significant federal issues." *Grable & Sons Metal Prods, Inc. v. Darue Eng'g*, 545 U.S. 308, 312 (2005). Specifically, each claim on its face presents a question of federal law (whether the Vanderbilt casino is located on Indian lands) that is disputed by the parties. *See id.* at 314. That question could have a substantial impact on both the present litigation and on federal Indian-gaming law more generally. *Id.* And there is no reason to think Congress would prefer this question to be resolved by state courts. *Id.* To the contrary, Indian law is primarily the province of the federal courts. So federal jurisdiction does exist for these claims—but only these.

IV.

As to these claims, Bay Mills argues that it is immune from suit. The Supreme Court has held that, "[a]s a matter of federal law," Indian tribes are immune from suit except in specific, limited circumstances. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Although we have treated questions of tribal immunity as jurisdictional, *see Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 919–20 (6th Cir. 2009), tribal immunity is different from other jurisdictional issues in key respects: notably, it does not arise from Article III of the Constitution, but is judicially created, developing "almost by accident." *Kiowa Tribe*, 523 U.S. at 756. Thus, the issue is whether the State's remaining claims fall within those judicially created bounds here.

The Supreme Court has recognized tribal immunity "without drawing a distinction based on where the tribal activities occurred." *Id.* at 754. Thus, although the State may regulate tribal activities that occur outside Indian lands, *see Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973), it may not (absent waiver or abrogation of tribal immunity) enforce those regulations by suing the tribe itself. *See Kiowa Tribe*, 523 U.S. at 755; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). "There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe*, 523 U.S. at 755. Under the plain terms of these precedents, therefore, the mere fact that the Vanderbilt casino's operations might (and perhaps likely do) occur outside Indian lands does not mean that the Bay Mills tribe itself can be sued on account of them. *See Cohen's Handbook of Federal Indian Law* § 7.05[1][b] (2005 ed. Supp. 2009) ("The Supreme Court has consistently distinguished between the questions of whether tribal activities are subject to state laws and whether the tribe may be sued to enforce those laws").

Under the Court's precedents, rather, Bay Mills is immune from suit unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe*, 523 U.S. at 754. An abrogation of tribal immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks and citation omitted). Similarly, a tribe's waiver of its immunity must be "clear." *C & L Enters., v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532

U.S. 411, 418 (2001). So we turn to whether there has been such an abrogation or waiver here.

A.

The State argues that Congress has abrogated Bay Mills's immunity from this suit in two federal statutes. First, the State turns again to the Regulatory Act, specifically 25 U.S.C. § 2710(d)(7)(A)(ii). By its terms, this provision supplies federal jurisdiction and abrogates tribal immunity at a single stroke. But to do so, as discussed above, all of its textual prerequisites must be met. *See Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999). It is true, as the plaintiffs point out, that the Tenth Circuit has taken the opposite approach with respect to abrogation of tribal immunity under § 2710(d)(7)(A)(ii). *See Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385–86 (10th Cir. 1997) (a case unrelated to the Supreme Court's decision in *Jones*, discussed above). But *Mescalero* offers virtually no analysis in support of its contrary reading of § 2710(d)(7)(A)(ii)—a point which the State, to its credit, concedes here; and to the extent the opinion does offer any analysis, it mistakenly cites waiver cases rather than abrogation ones. We agree with the Eleventh Circuit, therefore, that *Mescalero*'s reasoning is "muddled" rather than persuasive. *Seminole Tribe*, 181 F.3d at 1241. Thus, for the same reasons that § 2710(d)(7)(A)(ii) does not supply federal jurisdiction in this case, it does not abrogate Bay Mills's immunity either.

Second, the State argues that Congress abrogated Bay Mills's immunity in 18 U.S.C. § 1166. Section 1166(a) provides the following with respect to gambling

that is not conducted under an approved Tribal-State gaming compact:

> for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

The State acknowledges that it may not bring criminal charges against Bay Mills under this section, since § 1166(d) vests the federal government with exclusive jurisdiction over criminal prosecutions brought under § 1166(a). But the State does argue that § 1166(a) authorizes the State to bring this civil action. Specifically, the State notes that Michigan law authorizes a State prosecutor—or even a citizen—to bring a civil-nuisance suit to enjoin "any person" from allowing a building to be used for gambling. *See* Mich. Comp. Laws §§ 600.3805, 600.3801. Thus, the State says that, by incorporating this provision, § 1166(a) abrogates Bay Mills's immunity with respect to the State's request for injunctive relief here.

This question is closer than the other ones. Michigan's statute authorizing civil suits to abate a nuisance is a "State law[] pertaining to the . . . regulation . . . of gambling," so "for purposes of federal law" it "shall apply" in Indian country "in the same manner" as elsewhere in Michigan. 18 U.S.C. § 1166(a). As a matter of inference, therefore, the State's argument is coherent. But it takes more than inferential logic to abrogate tribal immunity. What it takes is an "unequivocal expression" of Congress.

Santa Clara Pueblo, 436 U.S. at 59. Sometimes that unequivocal expression can be implicit, as § 2710(d)(7)(A)(ii) of the Regulatory Act itself demonstrates. But the expression is too attenuated here. Section 1166(a) itself does not expressly authorize a State to sue anyone, much less an Indian tribe. *See United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, 927 F.2d 1170, 1177 (10th Cir. 1991). And neither § 1166(a) nor the cited sections of Michigan law say anything about suing Indian tribes in particular. Meanwhile, the plaintiffs' reading of § 1166(a) would elevate that subsection to a position of paramount importance for tribal-state relations: notwithstanding the particularized remedies authorized by the Regulatory Act or the Tribal-State compact, a tribe's immunity would turn on the happenstance of a particular state's civil anti-gambling statutes, rather than on any provision of federal law. We do not see in § 1166(a) an unequivocal expression of intent to bring about these consequences. That provision therefore does not abrogate Bay Mills's immunity either.

B.

The State also argues that Bay Mills waived its immunity in its tribal gaming ordinance. The ordinance creates a Tribal Gaming Commission. Section 4.18 of the ordinance includes among the Commission's powers the following:

> (Y) To sue or be sued in courts of competent jurisdiction within the United States and Canada, subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity[.]

Section 4.7 relates to sovereign immunity:

> **Waiver of Sovereign Immunity of the Tribal Commission.** Sovereign immunity of the Tribal Commission may be waived only by express resolutions of both the Tribal Commission and the Tribal Council . . . . Neither the power to sue and be sued provided in Subsection 4.18(Z),[1] nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed a . . . consent to suit in respect of any land within the exterior boundaries of the Reservation[.]

The State says that, taken together, these two provisions expressly waive the tribe's immunity for suits, like this one, involving land outside the reservation.

The argument is meritless. Section 4.7 only concerns immunity for the *Tribal Commission*, not the Tribe itself. What the State neglects to mention, remarkably, is that § 4.8 addresses the Tribe's immunity—and does so in terms that plainly preclude any waiver here:

> **Sovereign Immunity of the Tribe.** All inherent sovereign rights of the Tribe as a federally-recognized Indian tribe with respect to the . . . activities of the Tribal Commission are hereby expressly reserved, including sovereign immunity from suit in any state,

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[1] We assume that the intended cross reference here is to subsection 4.18(Y). Subsection 4.18(Z) does not provide the power to sue and be sued.

> federal or tribal court. *Nothing in this Ordinance, nor any action of the Tribal Commission, shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe*[.]

(Emphasis added.)

Tendentious, junk-drawer arguments like this one are best left out of a brief. They waste opposing counsel's time and ours. We reject the argument here.

C.

Our decision today is not to the exclusion of other remedies that might (or might not) be available to the plaintiffs. Notably, they can ask the United States to sue Bay Mills, since tribes are not immune from suits brought by the federal government. *See Cohen*, *supra*, at § 7.05[1][a] (2005 ed.). And nothing in our decision casts doubt on the State's ability to apply non-discriminatory laws against Indians who go beyond the boundaries of Indian country, so long as there is no federal law to the contrary. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112–13 (2005).

Finally, it appears the Supreme Court has left open the question whether a State may bring claims against tribal officers in their official capacity. *See Okla. Tax Comm'n*, 498 U.S. at 514 ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State"). In fact, the State has already amended its complaint to name various Bay Mills tribal officers as defendants. But

those officers are not present in this appeal, and they are not named on the injunction. We express no opinion as to whether, or under what circumstances, those officers may be sued.

* * *

The district court's preliminary injunction is vacated, and the case remanded for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

No. 1:10-cv-1273

-v-

HONORABLE
PAUL L. MALONEY

BAY MILLS INDIAN COMMUNITY,
Defendant,

and

LITTLE TRAVERSE BAY BAND
OF ODAWA INDIANS,
Plaintiff,

No. 1:10-cv-1278

-v-

HONORABLE
PAUL L. MALONEY

BAY MILLS INDIAN COMMUNITY,
Defendant.

OPINION AND ORDER GRANTING PLAINTIFF LITTLE TRAVERSE BAY BAND OF ODAWA INDIAN'S MOTION FOR PRELIMINARY INJUNCTION

The Little Traverse Bay Band of Odawa Indians seeks a preliminary injunction (ECF No. 3 in 1:10-cv-1278) against the Bay Mills Indian Community's

gaming operation in Vanderbilt, Michigan.[1] The State of Michigan ("State") and the Little Traverse Bay Band of Odawa Indians ("Little Traverse Bay") filed nearly identical suits against the Bay Mills Indian Community ("Bay Mills"). Both suits seek declaratory and injunctive relief. The two lawsuits were deemed related and the parties were ordered to file all documents in the first filed lawsuit.[2] (ECF No. 2.) The State has neither filed its own motion for a preliminary injunction nor moved to join Little Traverse Bay's motion. The State has, however, filed a brief in support (ECF No. 13) of Little Traverse Bay's motion for a preliminary injunction. Oral arguments on the motion occurred on March 23, 2011.

I. FACTUAL BACKGROUND

According to Bay Mills, years ago, it sought compensation from the United States under the Indian Claims Commission Act ("ICCA") of 1946, 25 U.S.C. § 70, asserting that Bay Mills had been inadequately compensated for land ceded in various treaties. Ultimately, several judgments were issued in favor of Bay Mills. In the 1970s, Congress appropriated the funds to pay for those judgments, however, no disbursements of the funds occurred. In 1996, Bay Mills sued the Department of the Interior under the

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[1] Both Little Traverse Bay Band of Odawa Indians and Bay Mills Indian Community are federally recognized Indian tribes. Both tribes have negotiated tribal compacts with the State of Michigan, allowing them to operate class III gaming facilities.

[2] Except where specifically noted, all references to document numbers in the electronic case file ("ECF") are to the docket sheet and record in 1:10-cv-1273. The motion for a preliminary injunction has never been filed in 1:10-cv-1273.

Indian Tribal Judgment Funds Act of 1983, 25 U.S.C. § 1401, asserting a failure to facilitate distribution of the allocated funds. The parties reached an agreement requiring the Department of the Interior to draft and submit proposed legislation to the Office of Management and Budget authorizing the use or distribution of the judgment awards.[3] *Bay Mills Indian Cmty. v. Bruce Babbit*, No. 96-0553 SS (D.D.C. Sept. 16, 1996) (unpublished order). The action was dismissed with prejudice upon completion of the Department of the Interior's obligations.[4] *Bay Mills Indian Cmty. v. Bruce Babbit*, No. 96-0553 SS (D.D.C. Apr. 4, 1997) (unpublished order). The proposed legislation, after modifications, was passed by Congress and signed by the President on December 15, 1997, as the Michigan Indian Land Claims Settlement Act ("MILCSA"), Pub. L. 105-143, 111 Stat. 2652.[5]

MILCSA distributes judgment funds and establishes plans and guidelines for the use of those funds for certain groups of Indians in Michigan. In section 104(a) and (b), MILCSA distributes ICCA judgment funds to various tribes, including both Bay Mills and Little Traverse Bay. In addition, in section 107, MILCSA establishes a plan for use and distribution of Bay Mills Indian Community funds. Under section 107(a)(1), Executive Council of Bay Mills must establish a nonexpendable trust known as the Land Trust, and deposit twenty percent of the funds received into the Land Trust. Section 107(a)(4) provides that the principal of the Land Trust shall not

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[3] Bay Mills Resp. Ex. A.

[4] Bay Mills Resp. Ex. C.

[5] Bay Mills Resp. Ex. I.

be expended for any purpose. Section 107(a)(3) outlines how the earnings, or interest on the principal, may be expended.

> (3) The earnings generated by the Land Trust shall be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land acquired with funds from the Land Trust shall be held as Indian lands are held.

MILCSA, Pub. Law 105-143 § 107(a)(3).

On August 27, 2010, Bay Mills purchased approximately 40 acres of land in the village of Vanderbilt, Michigan ("Vanderbilt Tract"), along Interstate Highway 75. (Little Traverse Bay Br. Ex. 3 - Warranty Deed.) The Vanderbilt Tract was purchased with funds derived exclusively from the interest generated by the funds in the Land Trust. (Bay Mills Ex. L.) The Vanderbilt Tract is approximately 125 driving miles south of the Bay Mills reservation, which is located near Brimley, Michigan, in the Upper Peninsula. (Little Traverse Bay Br. Ex. 4 - Alan Proctor Dec. Attached Map.) Vanderbilt is located in the lower portion of Michigan. On November 3, 2010, Bay Mills opened a class III gaming facility at the Vanderbilt Tract, which is known as the "Bay Mills Resort & Casinos, Vanderbilt" ("Vanderbilt Casino"). When the Vanderbilt Casino opened, it housed 38 slot machines. (Bay Mills Resp. Ex. E - Jeffrey Parker Dec. ¶ 4.) When this action was filed, Bay Mills was in the process of expanding the Vanderbilt Casino, which has now been completed. The Vanderbilt Casino currently houses 84 slot machines. (*Id.* ¶ 5.) Bay Mills currently

has no plans to expand the Vanderbilt Casino beyond the current number of electronic gaming devices. At oral argument, counsel for Bay Mills acknowledged that the existing compact did not prevent Bay Mills from expanding the Vanderbilt Casino in the future.

Little Traverse Bay currently operates the Odawa Casino Resort in Petoskey, Michigan ("Petoskey Casino"). Little Traverse Bay's Petoskey Casino contains almost 1,500 slot machines, as well as table games. (Little Traverse Bay Br. Ex. 17 - Alea Advisors' Report, 22-23.) The Petoskey Casino also contains a hotel and restaurants. (*Id.*) Bay Mills' Vanderbilt Casino is approximately forty driving miles east of Little Traverse Bay's Petoskey Casino. (Procter Dec. Attached Map.)

II. LEGAL FRAMEWORK FOR ISSUING A PRELIMINARY INJUNCTION

A trial court may issue a preliminary injunction under Fed. R. Civ. P. 65. A district court has discretion to grant or deny preliminary injunctions. *Warshak v. U.S.*, 490 F.3d 455, 465 (6th Cir. 2007). When deciding a motion for a preliminary injunction, a court should consider and balance four factors: (1) whether the moving party has established a substantial likelihood or probability of success on the merits; (2) whether the moving party will suffer an irreparable injury if the court does not grant a preliminary injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief. *Id.* (citation omitted); *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994); *see Winter v. Natural Res. Def. Council, Inc.*, 555

U.S. 7, 129 S.Ct. 365, 374 (2008). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (citation omitted). Typically, the purpose of a preliminary injunction is to preserve the status quo. *Smith Wholesale Co., Inc. v. R.J.R. Tobacco*, 477 F.3d 854, 873 n. 13 (6th Cir. 2007) (quoting *U.S. v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004)).

A. Likelihood of Success on the Merits

1. Jurisdiction

Both Little Traverse Bay and Bay Mills begin their discussions of this first factor with assertions about whether this Court has jurisdiction over the allegations in the complaint. Ordinarily, subject matter jurisdiction must be satisfied before a court may consider the merits of a claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Where a jurisdictional question is raised, a court may properly consider it as part of the "likelihood of success on the merits" factor. *See U.S. Ass'n of Importers of Textiles and Apparel v. Dep't of Commerce*, 413 F.3d 1344, 1438 (Fed. Cir. 2005).

Bay Mills asserts this Court lacks jurisdiction over the complaint. A district court has authority to "enjoin a class III gaming activity *located on Indian land* and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). Bay Mills argues the entire basis of Little Traverse Bay's complaint is that the Vanderbilt Casino is not located

on "Indian land." Little Traverse Bay's complaint asserts 28 U.S.C. § 1331, 25 U.S.C. § 2710(d)(7)(A)(ii), and 28 U.S.C. § 1362 as the bases for jurisdiction. (ECF No. 1 in 1:10-cv-1278 - Compl. ¶ 3.) Count III of the complaint alleges a violation of 25 U.S.C. § 2719. (*Id.* ¶¶ 25-29.)

For the purpose of deciding this motion, this Court has jurisdiction over the subject matter in the complaint. Bay Mills addresses only one of the several bases for jurisdiction identified in the complaint. This Court has jurisdiction over civil actions arising under federal law. 28 U.S.C. § 1331. Each claim in the complaint hinges on whether land purchased by earnings in the Land Trust constitutes "Indian lands". That determination requires this Court to interpret MILCSA § 107(a)(3), obviously a federal law. This Court also has jurisdiction over civil actions "brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the controversy arises" under federal law. 28 U.S.C. § 1362. Little Traverse Bay is such a tribe.

At oral argument, counsel for Little Traverse Bay asserted that Bay Mills should be estopped from asserting that § 2710(d)(7)(A)(ii) precluded this Court from exercising jurisdiction. Judicial estoppel prevents a party who prevails in one phase of a case from asserting and relying on a contradictory argument to prevail in another phase. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted). Judicial estoppel protects the integrity of the courts by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749- 50 (citation omitted). Judicial estoppel

applies where a party asserts a position that is contrary to one that the party has asserted, under oath, in a prior proceeding, and where the prior court adopted the contrary position as a preliminary matter or part of a final disposition. *Longaberger Co. v. Kolt*, 586 F.3d 459, 470 (6th Cir. 2009) (citation omitted). The Sixth Circuit Court of Appeals has noted that "other courts have found that judicial estoppel bars changes in factual positions and does not extend to inconsistent opinions or legal positions." *Id.* (citations omitted); *see Guaranty Residential Lending, Inc. v. Homestead Mortg. Co. LLC*, 291 F.App'x 734, 743 (6th Cir. 2008) ("Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one.") (citation omitted); *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1220 (6th Cir. 1990) ("Judicial estoppel exists to 'protect the *courts* 'from the perversion of judicial machinery' through a party's attempt to take advantage of both sides of a factual issue at different stages of the proceedings.'") (citation omitted) (emphasis added in *Teledyne*).

On the record before the court, judicial estoppel does not bar Bay Mills from asserting that this Court lacks jurisdiction under 25 U.S.C. § 2710(d)(A)(7)(ii). These two parties were involved in prior litigation. In 1999, Bay Mills sued Little Traverse Bay, challenging whether the Little Traverse Bay's casino, the forerunner of the casino in Petoskey, was on Indian land. Bay Mills sought a preliminary injunction under 25 U.S.C. § 2710(d)(7)(A)(ii) and asked the court to shut down the casino because it was not on "Indian land." (Little Traverse Bay Reply Ex. 2 - Bay Mills

Brief in Support of Motion for Preliminary Injunction in 5:99-cv-88.) The court issued the injunction and concluded that it had jurisdiction under the statute. (Little Traverse Bay Br. Ex. 7 - *Bay Mills Indian Cmty. v. Little Traverse Bay Band of Odawa Indians*, No. 5:99-cv-88 (W.D. Mich. Aug. 30, 1999) Bell, J.) (opinion)). Assuming, for the sake of argument only, that the statements made in the prior litigation are applicable here, Bay Mills' assertions were not factual statements made under oath. Rather, Bay Mills' was asserting a legal conclusion about whether the land where Little Traverse Bay's casino was located was on Indian land. Bay Mills has made no contradictory factual assertions under oath here.

2. Indian Lands

Congress enacted the Indian Gaming Regulatory Act ("IGRA") in 1988 to establish a statutory basis for the operation and regulation of gaming activities by Indian tribes. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996). The IGRA authorizes three classes of gaming activities. *Id.* Class III, the most heavily regulated of the three classes, is defined as all forms of gaming that are not class I or class II, and generally includes such things as slot machines, table games, dog racing, and lotteries. *Id.* IGRA authorizes an Indian tribe to allow class III gaming on "Indian lands", only under certain circumstances. 25 U.S.C. § 2710(d)(1). IGRA defines the term "Indian land" to mean (1) land that is part of a reservation, (2) land held in trust by the United States for the benefit of an Indian tribe, or (3) restricted fee lands.[6] 25 U.S.C. § 2703(4). The

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[6] IGRA defines "Indian lands" as

National Indian Gaming Commission ("NIGC") has promulgated regulations that include the same meaning of the term "Indian lands."[7] 25 C.F.R. § 502.12. The Bay Mills' gaming compact allows the Tribe to conduct class III gaming on "Indian lands." (Little Traverse Bay Br. Ex. 2 - Bay Mills Gaming Compact Sec. 1(C).) The Bay Mills compact defines "Indian lands" as

> (1) all lands currently within the limits of the Tribe's reservation;
>
> (2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and
>
> (3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Tribe exercises governmental power.

(Bay Mills Gaming Compact Sec. 2(B).)

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

[7] The NIGC was created by the IGRA, 25 U.S.C. § 2704, and has the power to promulgate regulations necessary to implement its duties, 25 U.S.C. § 2706(b)(10).

In order to succeed on the merits, Little Traverse Bay must establish that the Bay Mills' Vanderbilt Casino is not on "Indian land." Neither party asserts the Vanderbilt Tract is part of the Bay Mills reservation. Bay Mills acknowledges the Vanderbilt Tract is not held in trust. (Bay Mills Resp., 9.) Therefore, in order for the Vanderbilt Tract to be on "Indian land", the land must be land held in restricted fee. In addition, Bay Mills must have jurisdiction over the tract and it must exercise governmental power over the tract. *See Kansas v. United States*, 249 F.3d 1213, 1228 (2001).

Little Traverse Bay has clearly established a substantial likelihood of success on the merits. Little Traverse Bay asserts the statutory language of MILCSA § 107(a)(3) neither authorizes the purchase of the Vanderbilt Tract nor requires that any such land purchase be held in restricted fee status. If either assertion is true, the Vanderbilt Tract is not on Indian land and the Vanderbilt Casino is operating illegally. The Court agrees with Little Traverse Bay on its first assertion, that MILCSA does not authorize Bay Mills to purchase the Vanderbilt Tract from the earnings in the Land Trust. As a result, the Court need not determine whether land purchases authorized by MILCSA are necessarily held in restricted fee.[8]

In situations requiring statutory construction, federal courts being by considering the language of the statute at issue, here MILCSA § 107(a)(3). *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450

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[8] The parties dispute whether the phrase "held as Indian lands are held" requires that any land purchased by the earning of the Land Trust be held in restricted fee. *See* MILCSA § 107(a)(3).

(2002); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989). "The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart*, 534 U.S. at 450 (internal quotation marks and citation omitted). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). When no statutory definitions exist, courts may consult dictionaries for guidance on the plain meaning of the statute. *Appoloni v. United States*, 450 F.3d 185, 199 (6th Cir. 2006) (citations omitted); *see, e.g., Ransom v. FIA Card Servs., N.A.*, ___ U.S. ___, 131 S.Ct. 716, 724 (2011) (consulting dictionaries to determine the plain, ordinary meaning of "applicable"); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981) (relying on dictionary definitions for the plain meaning of the word "feasible"); *Franklin*, 619 F.3d at 614 (consulting dictionaries for the plain meaning of "clothes").

Section 107(a)(3) authorizes the earnings of the Land Trust to be used for two specific purposes: (1) improvements on tribal land and (2) the consolidation and enhancement of tribal landholdings. Bay Mills does not suggest or argue that the Vanderbilt Tract constitutes an "improvement on tribal land." Bay Mills defends the purchase as authorized by the second purpose. In the context of this provision, the statutory language has a plain and obvious meaning. The word

"consolidate" means "to bring together or unify."[9] The word "enhance" means "to improve or make greater" or "to augment."[10] Obviously, the purchase of the Vanderbilt Tract is an enhancement of tribal landholdings, as the additional land augmented, or made greater, the total land possessed by Bay Mills. However, the statute does not authorize every enhancement. The statute uses the conjunction "and" between the word "consolidation" and the word "enhancement." The use of the word "and" cannot be ignored. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is, however, a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'") (citations omitted). In order for the purchase of land to be an "enhancement" authorized by the § 107(a)(3), the purchase must also be a "consolidation." The statute requires any land purchase to be *both* a consolidation

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[9] *See* American Heritage Dictionary 403 (3d ed. 1996) (defining "consolidate" as "to unite into one system or whole; combine"); Black's Law Dictionary 327 (8th ed. 2004) (defining "consolidate" as "[t]o combine or unify into one mass or body"); Webster's New Universal Unabridged Dictionary 434 (2d ed. 2003) (defining "consolidate" as "to bring together (separate parts) into a single or unified whole; unite; combine"); The word "consolidate" is the verb form of the noun "consolidation." To be for the purpose of "consolidation", the purchase of land must "consolidate" tribal landholdings.

[10] *See* American Heritage Dictionary 611 (3d ed. 1996) (defining "enhance" as "[t]o make greater, as in value, beauty, or reputation; augment"); Black's Law Dictionary 570 (8th ed. 2004) (defining "enhancement" as "[t]he act of augmenting"); Webster's New Collegiate Dictionary 375 (1979) (defining "enhance" as "to make greater (as in value, desirability, or attractiveness)). The word "enhance" the verb form of the noun "enhancement". To be for the purpose of "enhancement", the land purchase must augment, improve or enlarge the tribal landholdings.

and an enhancement. Under § 107(a)(3), Bay Mills may use the earnings from the land trust to acquire additional land next to, or at least near, its existing tribal landholdings. The statute does not allow Bay Mills to create a patchwork of tribal landholdings across Michigan.

Bay Mills arguments to the contrary are not persuasive. Bay Mills insists that courts have read the word "and" to mean "or" and the word "or" to mean "and," citing *De Sylva v. Ballentine*, 352 U.S. 570, 573 (1956) and *United States v. Moore*, 613 F.2d 1029, 1040 n. 86 (D.C. Cir. 1979). (Bay Mills Resp., 18.) Indeed, in both opinions, the word "or" was interpreted to mean "and". The usefulness of those two opinions is limited to situations where the statute is ambiguous. In *De Sylva*, the Court noted the statute "is hardly unambiguous" and the issue raised in the litigation was "not solved by literal application of words as they are 'normally' used." 352 U.S. at 573. The Court resolved the ambiguity caused by the use of the word "or" by looking to the surrounding provisions. *Id.* at 573-74. Similarly, in *Moore*, the court began by noting that "[n]ormally, of course, 'or' is to be accepted for its disjunctive connotation, and not as a word interchangeable with 'and.'" 613 F.2d at 1040. The court went on to say that the "canon" was not "inexorable" and that sometimes "a strict grammatical construction will frustrate legislative intent." *Id.* The court described, in some detail, its frustration with finding the appropriate interpretation of the statutory provision. *Id.* at 1041. Because of its concerns with the language, the court found it appropriate to examine the legislative history. *Id.* ("With a literal interpretation of Section 1623(d) on this score thus uncomfortably

dubious, we turn to the legislative history for assistance.") Because § 107(a)(3) is unambiguous, there is no need to either depart from the ordinary rules of construction or resort to the provision's legislative history.[11]

Bay Mill's interpretation of the first sentence of § 107(a)(3), that land may be purchased to either enhance or consolidate tribal landholdings, renders the word "consolidation" nugatory or mere surplusage.[12] Every purchase of land from the earning of the Land Trust is an enhancement of tribal landholdings. It does not matter if the tract is next to the Bay Mills reservation in the Upper Peninsula or if the tract is in Detroit. Because every possible purchase of land would be an enhancement, there would be no need for the alternative consideration, a purchase that consolidates tribal landholdings. Thus, Bay Mills' interpretation of the statute fails because it does not give meaning, where possible, to each and every word in the statute. By interpreting the word "and" to mean "or", the words "consolidation" and "and" loses any significance in the statutory provision.

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[11] After this litigation was initiated, the Department of the Interior and the NIGC issued opinions concerning the proper interpretation of MILCSA § 107(a)(3). (ECF Nos. 7-1 and 7-2.) The parties disagree about the weight the Court should assign to these two documents. Because the Court finds the statutory provision is not ambiguous, resort to these two opinions is not necessary.

[12] As part of its defense of its interpretation, Bay Mills claims the Executive Council of the Tribe, as trustee of the Land Trust, MICSCA § 107(a)(2), acted within the discretion afforded it under the statute, and approved the purchase of the Vanderbilt Tract. The Executive Council's discretion is not unfettered; the Executive Council must exercise its discretion to approve land purchases within the parameters established by the statute.

Bay Mills reliance on the Indian canons of statutory construction does not compel a different conclusion. Under the Indian canons of construction, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Where the statutory language is not ambiguous, this canon does not apply. *See Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 555 (1987); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist, ...").

B. Irreparable Harm

The parties dispute whether Little Traverse Bay currently suffers any economic harm and whether Little Traverse Bay will suffer any economic harm in the future. Little Traverse Bay argues the Vanderbilt Casino harms the Petoskey Casino through unfair competition, loss of customer goodwill and by competing for the same gambling revenue streams. In an analysis of the economic impact of Vanderbilt Casino on the Petoskey Casino, Alea Advisors concludes the Pestosky Casino will "begin to operate at a loss." (Alea Advisors Report, 29.) Bay Mills challenges both the assumptions and the methodology in the Alea Advisors Report. (Bay Mills Resp. Ex. 4 - Jacob Miklojcik Dec.)

"A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet*, 305 F.3d at 578 (citing *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511

(6th Cir. 1992)). When evaluating the harm alleged to occur if an injunction is not granted, courts should consider three factors: (1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided. *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). A loss of market share has been held to constitute irreparable harm. *See Novartis Consumer Health, Inc. v. Johnson & Johnson - Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) ("In a competitive industry where consumers are brand loyal, we believe the loss of market share is a 'potential harm which cannot be redressed by a legal or an equitable remedy following a trial.'") (citation omitted).

Little Traverse Bay has established that it has and will suffer irreparable harm.[13] Little Traverse Bay has established that Bay Mills' Vanderbilt Casino targets, through advertising, customers of the Petoskey Casino. Bay Mills offers "Free Play" dollars for new customers to its casino who show rewards cards from the Petoskey Casino. (Little Traverse Bay Reply, Ex. A - David Wolf Dec. ¶¶ 8-11.) Mr. Wolf, a general manager at the Odawa Casino, estimates the Petoskey Casino may lose between $250,000 and $400,000 per month to the Vanderbilt Casino's 84 slot machines. (*Id.* ¶ 12.) Bay Mills' own expert, Jacob Miklojcik, concludes, with the current 84 slot machines at the Vanderbilt Casino, and using an "optimistically high average per machine per day figure," "it is difficult to believe that more than

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[13] For the reasons identified here, Little Traverse Bay has also established standing. Bay Mills argues Little Traverse Bay does not have standing to sue because it has not suffered any concrete injury fairly traceable to the Vanderbilt Casino.

25% (or $1.5 million) will be shifted from spending otherwise flowing to the [Petoskey] Casino." (Miklojcik Dec. ¶ 23.)

Additionally, as a federally recognized Indian tribe, Bay Mills is immune from suit for damages. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territory. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.") (internal citation and citation omitted). "Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010); *see QEP Field Servs. Co. v. Ute Indian Tribe of Uintah and Ouray Reservation*, 740 F.Supp.2d 1274, 1283-84 (D. Utah 2010) (finding irreparable harm for the purpose of a preliminary injunction because, under the agreement at issue, the defendant tribe had not waived its immunity from suit for money damages).

C. Impact of an Injunction on Others

Under this third factor, the plaintiff must show that the balance of the harm weighs in favor of granting an injunction. *See Winter,* 129 S.Ct. at 374. In other words, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 376 (quoting *Amoco Prod.*, 480 U.S. at 542). The balance of harms do not clearly favor either side. Gamblers will spend their money at either of the

two casinos. If an injunction is not granted, gamblers will continue to patronize the Vanderbilt Casino and Bay Mills and the Vanderbilt community will enjoy the resulting economic benefits, while the Petoskey Casino and the surrounding community will be deprived of those revenue streams. If the injunction is granted, gamblers will shift their patronage to the Petoskey Casino and Little Traverse Bay and the Petoskey community will enjoy the resulting economic benefits, while the Vanderbilt Casino and the surrounding community will be deprived of those same dollars. As the Court has already concluded, Little Traverse Bay has established a likelihood of success on the merits. Accordingly, the Vanderbilt Casino will likely have to be shut down at some point, tilting the balance of the harm in the favor of granting a preliminary injunction.

D. Public Interest

The public interest favors the issuance of a preliminary injunction. First, the continued operation of the Vanderbilt Casino deprives the State of income. Under its compact with the State, Little Traverse Bay pays the State money based, in part, on the revenue generated by electronic games of chance. (Little Traverse Bay Ex. 21 - Second Amendment to Gaming Compact Sec. 17.) Bay Mills' compact has no such similar provision. (Bay Mills Gaming Compact.) Second, on this record, this Court has already concluded Little Traverse Bay has a likelihood of success on the merits. The Court finds that Bay Mills is operating the Vanderbilt Casino illegally. As a result, through the continuing operation of the Vanderbilt Casino, Bay Mills invites the public to violate Michigan's prohibition on attending gambling houses,

a misdemeanor. *See* Mich. Compl. Laws § 750.309. The public has an interest in not being enticed to violate the law.

III. CONCLUSION

Little Traverse Bay has established a factual and legal basis for this Court to issue a preliminary injunction against the continued operation of Bay Mills' Vanderbilt Casino. For the purpose of this motion, the Court has jurisdiction over the lawsuit and Little Traverse Bay has established standing. Little Traverse Bay has demonstrated a likelihood of success on the merits. MILCSA did not authorize Bay Mills to purchase land in Vanderbilt, Michigan. Such purchase is not a "consolidation and enhancement of tribal landholdings." Therefore, the Vanderbilt Casino is not on Indian land. Little Traverse Bay has established irreparable harm. The evidence in the record demonstrates that the Vanderbilt Casino directly competes for gambling dollars with the Petoskey Casino and that gamblers who were previously going to the Petoskey Casino are now going to the Vanderbilt Casino. Because Bay Mills is immune from suit for damages, Little Traverse Bay has no remedy to recover that revenue. The balance of harms do not clearly favor either party. To the extent that Little Traverse Bay has established a likelihood of success, the third factor weighs in favor of granting an injunction. Finally, the public's interest in the State's share of revenue from electronic games at the Petoskey Casino and the public's interest in the enforcement of State law favor granting the injunction.

ORDER

For the reasons provided in the accompanying opinion, **IT IS HEREBY ORDERED**

1. Little Traverse Bay Band of Odawa Indian's motion for a preliminary injunction (ECF No. 3 in 1:10-cv-1278) is **GRANTED.**

2. Pending a final decision on the merits or further order of this Court, Bay Mills Indian Community is hereby **PRELIMINARILY ENJOINED** from operating a casino on the land it purchased in Vanderbilt, Michigan using funds from the Michigan Indian Land Claim Settlement Act Land Trust. Bay Mills shall cease operating slot machines and other electronic games of chance or any other gaming activities currently offered on its property in Vanderbilt, Michigan. Bay Mills shall not offer any other gaming activities on its property in Vanderbilt, Michigan, that may otherwise be allowed under its gaming compact with the State of Michigan.

3. Bay Mills shall comply with this order and shall cease its operation of the Vanderbilt Casino no later than 12:00 p.m., noon, on Tuesday, March 29, 2011.

Date: March 29, 2011 (9:26am)

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

Case No. 1:10-cv-01273-PLM

v.

HONORABLE
PAUL L. MALONEY

BAY MILLS INDIAN
COMMUNITY, et al.,
Defendant.

LITTLE TRAVERSE BAY BANDS
OF ODAWA INDIANS,
Plaintiff,

Case No. 1:10-cv-01278-PLM

v.

BAY MILLS INDIAN COMMUNITY
Defendant.

BAY MILLS INDIAN COMMUNITY ANSWER TO AMENDED COMPLAINT OF THE STATE OF MICHIGAN

NOW COMES Defendant, Bay Mills Indian Community ("Bay Mills"), by and through its attorneys, and in answer to the Amended Complaint of the State of Michigan ("State") states as follows:

JURISDICTION

1. (a) Bay Mills denies the legal conclusions contained in Paragraph 1(a) of the Amended Complaint that this Court has subject matter jurisdiction under 28 U.S.C. §1331 and federal common law.

(b) Bay Mills denies the legal conclusions contained in Paragraph 1(b) of the Amended Complaint that this Court has subject matter jurisdiction based on 25 U.S.C. §2710(d)(7)(A)(ii).

(c) Bay Mills denies the legal conclusions contained in Paragraph 1(c) of the Amended Complaint that this Court has subject matter jurisdiction under 28 U.S.C. §1367.

(d) Bay Mills denies the legal conclusions contained in Paragraph 1(d) that this Court has subject matter jurisdiction under 28 U.S.C. §2201.

PARTIES

2. Bay Mills admits the allegations contained in Paragraph 2.

3. Bay Mills admits the allegations contained in Paragraph 3.

4. Bay Mills admits the allegations contained in Paragraph 4 that the Bay Mills Indian Community Tribal Gaming Commission ("Commission") is a governmental subdivision of Bay Mills created by Section 4 of the Bay Mills Gaming Ordinance.

5. Bay Mills admits the allegations contained in Paragraph 5

6. Bay Mills admits the allegations contained in Paragraph 6.

7. Bay Mills admits the allegations contained in Paragraph 7.

8. Bay Mills admits the allegations contained in Paragraph 8.

9. Bay Mills admits the allegations contained in Paragraph 9.

10. Bay Mills admits the allegations contained in Paragraph 10.

VENUE

11. Bay Mills admits that it has Tribal offices in Chippewa County, Michigan and that venue is appropriate.

GENERAL ALLEGATIONS

12. Bay Mills admits the allegations contained in Paragraph 12.

13. The allegations of Paragraph 13 set forth conclusions of law to which no response is required. To the extent that a response is deemed required, the Gaming Compact and 25 U.S.C. §2703(8) speak for themselves and must be read in their entirety and in context.

14. The allegations of Paragraph 14 set forth conclusions of law to which no response is required. To the extent that a response is deemed required, the

Gaming Ordinance speaks for itself and must be read in its entirety and in context.

15. The allegations contained in Paragraph 15 set forth conclusions of law to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, the Gaming Ordinance speaks for itself.

16. Bay Mills admits the allegations contained in Paragraph 16.

17. The allegations contained in Paragraph 17 set forth conclusions of law to which no response is required as such conclusions are exclusively within the province of the court.

18. Bay Mills admits the allegations contained in Paragraph 18 that it conducts Class III gaming in casinos it operates in Chippewa County, but denies the allegation contained therein that those facilities are the only ones operated by Bay Mills on Indian lands.

19. Bay Mills admits the allegations contained in Paragraph 19.

20. Bay Mills admits the allegations contained in Paragraph 20.

21. Bay Mills admits the allegations contained in Paragraph 21.

22. The allegations contained in Paragraph 22 state legal conclusions to which no response is required, as such are exclusively within the province of the court.

23. Bay Mills admits the allegations contained in Paragraph 23.

24. Bay Mills admits the allegations contained in Paragraph 24.

25. Bay Mills denies the allegations contained in Paragraph 25, but to the extent that they state legal conclusions, no response is made as legal conclusions are exclusively within the province of the court.

26. Bay Mills admits the allegations contained in Paragraph 26.

27. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 27.

28. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 28.

29. Bay Mills admits the allegations contained in Paragraph 29 that a letter was sent on December 16, 2010, by an Assistant Attorney General for the State of Michigan, and denies any other allegations contained in said paragraph and leaves the State to its proofs.

30. Bay Mills admits the allegations contained in Paragraph 30.

31. The allegations contained in Paragraph 31 state legal conclusions to which no response is required. To the extent that a response is required, Bay Mills denies the allegations that Bay Mills has waived its sovereign immunity by entering into the Compact with the State.

32. The allegations contained in Paragraph 32 state legal conclusions to which no response is required. To the extent that a response is required, Bay Mills denies the allegations that its sovereign immunity was abrogated by Congress for the purposes of this legal action.

33. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 33.

34. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 34.

COUNT I—VIOLATION OF COMPACT SECTION 4(H)

35. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1-34 of this Answer as if set forth fully as Bay Mills' response to Paragraph 35.

36. The allegations contained in Paragraph 36 state legal conclusions to which no response is required. To the extent that a response is required, Bay Mills states that its Compact speaks for itself.

37. The allegations contained in Paragraph 37 state legal conclusions to which no response is required. To the extent that a response is required, Bay Mills states that its Compact speaks for itself.

38. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 38.

39. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 39.

40. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 40.

41. Bay Mills denies the allegations of mixed law and fact contained in Paragraph 41.

42. The allegations contained in Paragraph 42 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 25 U.S.C. §2710(d)(7)(A)(ii) actually states: "The United States district courts shall have jurisdiction over any cause of action initiated by a State or Indian tribe to enjoin a class III gaming facility *located on Indian lands* and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." [emphasis added]

COUNT II—VIOLATION OF COMPACT SECTION 4(C)

43. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1-42 of this Answer as if set forth fully as Bay Mills' response to Paragraph 43.

44. As its response to Paragraph 44, Bay Mills states that the Section 4(C) of the Compact speaks for itself.

45. The allegations contained in Paragraph 45 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court.

46. The allegations contained in Paragraph 46 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 18 U.S.C. §1955 speaks for itself and must be read in its entirety and in context.

47. The allegations contained in Paragraph 47 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 18 U.S.C. §1955 speaks for itself and must be read in its entirety and in context.

48. The allegations contained in Paragraph 48 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, M.C.L. 750.301 *et seq*. and M.C.L. 432.201 *et seq*. speak for themselves and must be read in their entirety and in context.

49. Bay Mills admits the allegations contained in Paragraph 49, to the extent that these allegations reference Bay Mills' operations of its Vanderbilt casino before it was closed by order of this court.

50. Bay Mills admits the allegations contained in Paragraph 50.

51. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 51.

52. The allegations contained in Paragraph 52 set forth conclusions of law to which no response is required, as such conclusions are exclusively within the

province of the court. To the extent that a response is required, §5.5(A) of the Gaming Ordinance speaks for itself and the Ordinance must be read in its entirety and in context.

53. The allegations contained in Paragraph 53 set forth conclusions of law to which no response is required, as such conclusions are exclusively within the province of the court. To the extent that a response is required, §5.5(A) of the Gaming Ordinance speaks for itself and must be read in its entirety and in context.

54. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 54.

55. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 55.

56. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 56.

57. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 57.

58. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 58.

59. The allegations contained in Paragraph 59 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 25 U.S.C. §2710(d)(7)(A)(ii) actually states: "The United States district courts shall have jurisdiction over any cause of action initiated by a State or Indian tribe to enjoin a class III gaming facility *located on Indian lands* and conducted in violation of any Tribal-

State compact entered into under paragraph (3) that is in effect." [emphasis added]

COUNT III—VIOLATION OF IGRA

60. Bay Mills hereby adopts and incorporates herein by reference paragraphs 1-59 of this Answer as if set fully forth as Bay Mills' response to Paragraph 60.

61. The allegations contained in Paragraph 61 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 25 U.S.C. §2710(d) speaks for itself and must be read in its entirety and in context.

62. As its response to the allegations contained in Paragraph 62, Bay Mills states that IGRA speaks for itself.

63. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 63.

64. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 64.

65. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 65.

66. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 66.

67. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 67.

68. The allegations contained in Paragraph 68 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 25 U.S.C. §2710(d)(7)(A)(ii) actually states: "The United States district courts shall have jurisdiction over any cause of action initiated by a State or Indian tribe to enjoin a class III gaming facility *located on Indian lands* and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." [emphasis added]

COUNT IV—VIOLATION OF FEDERAL COMMON LAW

69. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1-68 of this Answer as if set fully forth as Bay Mills' response to Paragraph 69.

70. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 70.

71. The allegations contained in Paragraph 71 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, Bay Mills denies the allegation that its operation of the Vanderbilt casino was not in conformance with the requirements of IGRA.

72. The allegations contained in Paragraph 72 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court.

73. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 73.

74. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 74.

75. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 75.

COUNT V—VIOLATION OF MICHIGAN GAMING CONTROL AND REVENUE ACT

76. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1—75 of this Answer as if set fully forth as Bay Mills' response to Paragraph 76.

77. As its response to the allegations contained in Paragraph 77, Bay Mills states that M.C.L. 432.220 speaks for itself and must be read in its entirety and in context.

78. Bay Mills admits the allegations contained in Paragraph 78.

79. Bay Mills admits the allegations contained in Paragraph 79.

80. Bay Mills admits the allegation in Paragraph 80 that gambling game equipment was used in the Vanderbilt casino, but denies the allegation that the equipment was used for unauthorized gambling.

81. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 81.

COUNT VI–NUISANCE

82. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1—81 of this Answer as if set fully forth as Bay Mills' response to Paragraph 82.

83. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 83.

84. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 84.

85. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 85.

86. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 86.

87. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 87.

AFFIRMATIVE DEFENSES

88. As a federally recognized Indian Tribe, Bay Mills enjoys sovereign immunity from unconsented suit and that immunity has not been waived or abrogated. For this reason, the claims must be dismissed against Bay Mills as required by Fed.R.Civ.P. 12(b)(1) and 12(h)(3).

89. Bay Mills is a necessary party under Fed.R.Civ.P. 19. It has a substantial interest in the subject matter of this action, but cannot be joined because it enjoys sovereign immunity from unconsented suit and that immunity has not been waived or abrogated. This action cannot proceed

without Bay Mills, requiring dismissal of the entire case.

90. The State fails to state a claim upon which relief can be granted.

91. This Court lacks subject matter over the State's claims.

92. To the extent that its claims relate to interpretation of the law of the Bay Mills Indian Community, the State has failed to exhaust its remedies in the Bay Mills Indian Community Tribal Court.

Respectfully submitted,
BAY MILLS INDIAN COMMUNITY

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

By /s/ Chad P. DePetro
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

Case No. 1:10-cv-01273-PLM
Case No. 1:10-cv-01278-PLM

v.

Honorable Chief
Judge Paul L. Maloney

AMENDED COMPLAINT

THE BAY MILLS INDIAN COMMUNITY, BAY MILLS INDIAN COMMUNITY TRIBAL GAMING COMMISSION, INDIVIDUAL UNKNOWN MEMBERS OF THE BAY MILLS INDIAN COMMUNITY TRIBAL GAMING COMMISSION in their official capacity, JEFFREY PARKER, CHAIRMAN in his official capacity, TERRY CARRICK, VICE CHAIRMAN, in his official capacity, RICHARD LEBLANC, SECRETARY in his official capacity, JOHN PAUL LUFKINS, TREASURER in his official capacity and BUCKO TEEPLE, COUNCIL PERSON in his official capacity.

Defendants.

AMENDED COMPLAINT

Plaintiff State of Michigan brings the following Amended Complaint for declaratory and injunctive relief, and for an accounting and forfeiture:

JURISDICTION

1. The Court has federal subject matter jurisdiction of this action pursuant to:

a) 28 U.S.C. § 1331, as this Complaint alleges violations of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, and federal common law;

b) 25 U.S.C. § 2710(d)(7)(A)(ii), as Plaintiff is a State which seeks to enjoin gaming activity conducted in violation of a tribal-state compact;

c) 28 U.S.C. § 1367 as this Complaint alleges violations of State antigambling and other laws; and

d) 28 U.S.C. § 2201, as this Complaint also seeks a declaratory judgment.

PARTIES

2. Plaintiff is the State of Michigan (State).

3. Defendant Bay Mills Indian Community (Bay Mills) is a federally recognized Indian tribe.

4. Defendant Bay Mills Indian Community Tribal Gaming Commission (Tribal Commission) is a governmental subdivision and arm of Bay Mills created by Section 4 of the Bay Mills Gaming Ordinance

(Gaming Ordinance) (excerpts from most recent version of amended Gaming Ordinance as approved by the National Indian Gaming Commission on September 15, 2010, attached as Exhibit C) to operate for the sole benefit and interest of Bay Mills.

5. Individual unknown Members of the Bay Mills Indian Community Tribal Gaming Commission are officials of Bay Mills appointed by the Bay Mills Executive Council pursuant to the Gaming Ordinance, § 4.11(A) (Tribal Officials). Plaintiff does not know the names of the individuals who have been on the Gaming Commission during times relevant to this action, but will substitute those names as they become known through discovery.

6. Jeffrey Parker is Chairman of the Executive Council for Bay Mills.

7. Terry Carrick is Vice-Chair of the Executive Council for Bay Mills.

8. Richard LeBlanc is Secretary of the Executive Council for Bay Mills.

9. John Paul Lufkins is Treasurer of the Executive Council for Bay Mills.

10. Bucko Teeple is a Council Person on the Executive Council for Bay Mills (Messrs. Parker, Carrick, LeBlanc, Lufkins and Teeple referred to collectively as "Council Members.")

VENUE

11. Defendant Bay Mills has its Tribal offices and reservation in Chippewa County, in the Upper Peninsula of Michigan. Venue is therefore appropriate in this Court pursuant to 28 U.S.C. § 1391(b)(1).

GENERAL ALLEGATIONS

12. On or about August 20, 1993, John Engler, the Governor of the State of Michigan at that time, entered into a tribal-state gaming compact (the "Bay Mills compact") with Bay Mills. A true and correct copy of this compact is attached as Exhibit A.

13. The Bay Mills compact permits Bay Mills to operate casino games, also known as "Class III gaming" (which is defined in IGRA, 25 U.S.C. § 2703(8)), only on "Indian lands" as defined in Section 2(B) of the compact. See Exhibit A.

14. The Gaming Ordinance permits Bay Mills to conduct Class III gaming only on "Indian lands" as defined in Section 2.30 of the Gaming Ordinance. See Exhibit C.

15. The Gaming Ordinance only permits the operation of casinos owned by Bay Mills. Exhibit C, § 5.3(C).

16. Bay Mills created the Tribal Commission when it adopted its Gaming Ordinance which authorizes the Tribal Commission to approve and regulate all casinos operated by Bay Mills.

17. The Tribal Commission has the authority to close Tribally owned casinos that violate federal and/or Tribal law.

18. Since the Bay Mills compact was signed, Bay Mills has conducted Class III gaming in one or more casinos it operates on Indian lands in Chippewa County in the Upper Peninsula.

19. On or about November 3, 2010, ostensibly with the approval of the Tribal Commission, Bay Mills began operating a casino in a renovated building located in or near the village of Vanderbilt (the "Vanderbilt casino") in Otsego County in the Lower Peninsula of Michigan.

20. The Bay Mills Executive Council is authorized to take certain actions on behalf of Bay Mills.

21. The Bay Mills Executive Council, through the Tribal Council Members, made the decision to open and operate the Vanderbilt Casino.

22. The land on which the Vanderbilt casino is being operated is not part of the Bay Mills reservation.

23. The land on which the Vanderbilt casino is being operated was acquired by Bay Mills after October 17, 1988.

24. The land on which the Vanderbilt casino is being operated was not contiguous to the boundaries of the Bay Mills reservation on October 17, 1988.

25. The Vanderbilt casino is approximately 100 miles by road from the Bay Mills reservation.

26. The title to the land on which the Vanderbilt casino is being operated has not been taken into trust by the United States for the benefit of Bay Mills.

27. The land on which the Vanderbilt casino is being operated is not subject to restriction by the United States against alienation.

28. Bay Mills does not exercise governmental power over the land on which the Vanderbilt casino is being operated.

29. After consultations between Bay Mills and the State of Michigan failed to resolve the dispute giving rise to this action, the State sent a letter on December 16, 2010 to Bay Mills demanding that Bay Mills immediately cease the operation of all Class III gaming at the Vanderbilt casino. A true and correct copy of this letter is attached as Exhibit B.

30. Despite this demand, Defendants have refused to cease Class III gaming at the Vanderbilt casino.

31. By entering into the Tribal-State compact, Bay Mills waived its sovereign immunity for purposes of this legal action which seeks injunctive and declaratory relief to remedy violations of the Bay Mills compact and federal law.

32. Bay Mills' sovereign immunity was abrogated by Congress for purposes of this legal action when Congress adopted IGRA.

33. Bay Mills waived any sovereign immunity of the Tribal Commission for actions not in respect of lands within the exterior boundaries of Bay Mills'

Reservation when it adopted the Gaming Ordinance, including specifically §§ 4.7 and 4.18(Y).

34. The Tribal Commission and Bay Mills are alter egos, as evidenced in part by Bay Mills' absolute control over the Tribal Commission (see Gaming Ordinance generally); therefore this waiver also extends to Bay Mills.

COUNT I—VIOLATION OF COMPACT SECTION 4(H)

35. Plaintiff incorporates paragraphs 1-34 above as if fully stated in Count I.

36. Section 4(H) of the Bay Mills compact states: "The Tribe shall not conduct any Class III gaming outside of Indian lands."

37. Section 2(B) of the Bay Mills compact defines "Indian lands" to mean: "(1) all lands currently within the limits of the Tribe's Reservation; (2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and (3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Tribe exercises governmental power."

38. For the reasons stated in paragraphs 22-28 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Bay Mills compact.

39. The operation of Class III gaming at the Vanderbilt casino therefore violates and is a breach of the Bay Mills compact.

40. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates Tribal laws (see Count II below), the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II below), M.C.L. 432.201 *et seq.* (see Count V below) and federal anti-gambling statutes (18 U.S.C. § 1955), it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

41. There is no adequate remedy at law for this violation by Defendants of the Bay Mills compact which causes the State irreparable injury.

42. IGRA vests this Court with jurisdiction to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact, (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT II—VIOLATION OF COMPACT SECTION 4(C)

43. Plaintiff incorporates paragraphs 1-42 above as if fully stated in Count II.

44. Section 4(C) of the Bay Mills compact states:

> The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, *tribal law, IGRA, and all other applicable federal law*. This shall include but not be limited to the licensing of the consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81 and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violation of this Compact, *tribal law, IGRA, or other applicable federal law* shall be corrected immediately by the Tribe. (Emphasis added.)

45. The violation of IGRA, 25 U.S.C. § 2710(d)(1), set forth in Count III below, therefore also violates Section 4(C) of the Bay Mills compact.

46. 18 U.S.C. § 1955 makes it illegal for any person to conduct, finance, manage, supervise or own all or part of an illegal gambling business.

47. An illegal gambling business is defined in 18 U.S.C. § 1955 as a gambling business which is a violation of state law in which it is conducted, involves five or more persons and remains in business for more than 30 days, and grosses more than $2,000 in any single day.

48. Operation of the Vanderbilt casino violates Michigan's anti-gambling statutes, including M.C.L. 750.301 *et seq*. and M.C.L. 432.201 *et seq*.

49. On information and belief, the Vanderbilt casino involves more than five people and grosses more than $2,000 in a single day.

50. Before it was closed by Order of this Court, the Vanderbilt casino was in business more than 30 days.

51. Operation of the Vanderbilt casino therefore violates applicable federal antigambling laws, including 18 U.S.C. § 1955, and therefore violates Section 4(C) of the Bay Mills compact.

52. Section 5.5(A) of the Gaming Ordinance restricts operation of any Tribal casino to Indian lands which are defined in Section 2.30 of the Gaming Ordinance to mean: "(A) all lands within the limits of the Reservation of the Bay Mills Indian Community; and (B) all lands title to which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by [the] United States against alienation and over which the Tribe exercises governmental power."

53. Section 5.5(A) of the Gaming Ordinance also restricts operation of any Tribal casino to Indian lands that comply with Section 20 of IGRA, 25 U.S.C. § 2719.

54. For the reasons stated in paragraphs 22-28 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Gaming Ordinance.

55. For the reasons set forth in paragraph 66 below, the Vanderbilt casino does not comply with the requirements of 25 U.S.C. § 2719.

56. The operation of Class III gaming at the Vanderbilt casino therefore violates the Gaming Ordinance which is Tribal law and therefore violates Section 4(C) of the Bay Mills compact.

57. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates Tribal laws, the laws of the State of Michigan and federal anti-gambling statutes, it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

58. There is no adequate remedy at law for this violation by Bay Mills of its compact which causes the State irreparable injury.

59. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact; (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT III—VIOLATION OF IGRA

60. Plaintiff incorporates paragraphs 1-59 above as if fully stated in Count III.

61. Section 2710(d)(1) of IGRA permits Class III gaming only on "Indian lands" as that term is defined

in IGRA, and only if conducted "in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) [25 U.S.C. §2710(d)(3)] that is in effect" and only if authorized by a Tribal ordinance that meets the requirements of IGRA [25 U.S.C. § 2710(d)(1)(A)].

62. IGRA defines "Indian lands" to mean: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

63. Based on the facts alleged in paragraphs 22-28 above, the Class III gaming conducted by Bay Mills at the Vanderbilt casino is not being conducted on Indian lands and therefore violates IGRA.

64. The Class III gaming conducted by Defendants at the Vanderbilt casino also violates IGRA because, for the reasons stated in Counts I and II of this Complaint, this gaming is not being conducted "in conformance with" the Bay Mills compact.

65. The Class III gaming conducted by Defendants at the Vanderbilt casino also violates IGRA because, for the reasons stated in Count II of this Complaint, this gaming is not authorized by a duly enacted Tribal ordinance.

66. Finally, Class III gaming is prohibited pursuant to 25 U.S.C. § 2719 on the land on which the Vanderbilt casino is located, even if it is Indian lands,

because it was acquired by Bay Mills after October 17, 1988 and does not qualify for any of the exceptions described in 25 U.S.C. § 2719(b).

67. There is no adequate remedy at law for this violation by Defendants of IGRA which causes the State irreparable harm; since the operation of the Vanderbilt casino violates IGRA it cannot be in the public interest and the balance of harm of its continued operation weighs heavily in favor of the State.

68. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact; (2) declaring that the gaming at the Vanderbilt casino violates IGRA; (3) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (4) granting Plaintiff such other relief as the Court deems appropriate.

COUNT IV—VIOLATION OF FEDERAL COMMON LAW

69. Plaintiff incorporates paragraphs 1-68 above as if fully stated in Count IV.

70. As set forth above, because it is not on Indian lands, operation of the Vanderbilt casino violates State anti-gambling laws.

71. The Defendants did not have authority under federal law to approve and operate a casino that does not conform with the requirements of IGRA and that violates State antigambling laws.

72. When a Tribe and/or Tribal representatives permit and operate a casino which exceeds the scope of their authority, they violate federal common law governing Indian Tribes.

73. As the Class III gaming conducted at the Vanderbilt casino in violation of federal common law also violates Bay Mills compact (see Counts I and II above), Tribal law (see Count II), the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II), M.C.L. 432.201 *et seq.* (see Count V below), and federal anti-gambling statutes (18 U.S.C. § 1955) (see Count II), it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

74. There is no adequate remedy at law for this violation by Defendants of federal common law which causes the State irreparable injury.

75. Because the licensing and continued operation of the Vanderbilt Casino violated the Gaming Ordinance which requires that licenses be issued only to gaming establishments that are located on Indian lands, Council Members that authorized and operate the casino, and the Tribal Officials that approved the license for the Vanderbilt Casino and allowed its continuing operation exceeded their authority under Tribal law and they are therefore subject to prospective relief Ordered by this Court.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino exceeds the scope of Defendants' authority under federal law; (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT V—VIOLATION OF MICHIGAN GAMING CONTROL AND REVENUE ACT

76. Plaintiff incorporates paragraphs 1-75 above as if fully stated in Count V.

77. M.C.L. 432.220 states in relevant part:

> In addition to other penalties provided for under this act, a person who conducts a gambling operation without first obtaining a license to do so . . . is subject to a civil penalty equal to the amount of gross receipts derived from wagering on the gambling games, whether unauthorized or authorized, conducted on that day as well as confiscation and forfeiture of all gambling game equipment used in the conduct of unauthorized gambling games.

78. Defendants did not first obtain a State-issued license before operating the Vanderbilt casino.

79. On information and belief, Defendants derived gross receipts from wagering at the Vanderbilt casino on some or all of the days it was operated before being closed by Order of this Court, in a total amount that

Plaintiff believes is in the range of at least hundreds of thousands of dollars.

80. Gambling game equipment was used in the conduct of unauthorized gambling games at the Vanderbilt casino.

81. The violation of M.C.L. 432.220 subjects the above-described gross receipts and gambling game equipment to forfeiture.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order requiring (1) an accounting and forfeiture of all gross receipts obtained and gambling game equipment used by Defendants in violation of M.C.L. 432.220 and (2) granting Plaintiff such other relief as the Court deems appropriate.

COUNT VI—NUISANCE

82. Plaintiff incorporates paragraphs 1-81 above as if fully stated in Count VI.

83. As set forth above, any continued operation of the Vanderbilt casino is proscribed by law.

84. Any continued operation of the Vanderbilt casino would therefore be a public nuisance.

85. Defendants do not have authority to operate the Vanderbilt casino.

86. Any continued operation of the Vanderbilt casino harms the public interest and the balance of harm caused by such operation weighs heavily in favor of the State.

87. There is no adequate remedy at law for the continued operation of the Vanderbilt casino which causes the State irreparable injury.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino is a public nuisance, (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

Plaintiff further requests that it be awarded its costs and attorney fees incurred in bringing this action.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Louis B. Reinwasser

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Dated: July 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically filed the foregoing document with the Clerk of the court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

/s/ Louis B. Reinwasser
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reinwasserl@michigan.gov

Exhibit A

A COMPACT BETWEEN THE BAY MILLS INDIAN COMMUNITY AND THE STATE OF MICHIGAN PROVIDING FOR THE CONDUCT OF TRIBAL CLASS III GAMING BY THE BAY MILLS INDIAN COMMUNITY

THIS COMPACT is made and entered into this 20th day of August, 1993, by and between the **BAY MILLS INDIAN COMMUNITY** (hereinafter referred to as "Tribe") and the **STATE OF MICHIGAN** (hereinafter referred to as "State").

RECITALS

WHEREAS, the State of Michigan is a sovereign State of the United States of America, having been admitted to the Union pursuant to the Act of January 26, ch. 6, 1837, 5 Stat. 144 and is authorized by its constitution to enter into contracts and agreements, including this agreement with the Tribe; and

WHEREAS, the Tribe is a federally recognized Indian Tribe (reorganized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984; 25 U.S.C. § 476) and its governing body, the General Tribal Council, is authorized by the tribal constitution to enter into contracts and agreements of every description, including this agreement with the State; and

WHEREAS, the Congress of the United States has enacted the Indian Gaming Regulatory Act of 1988 (25 U.S.C. § 2701 et seq.) (hereinafter "IGRA"), which permits Indian tribes to operate Class III gaming activities on Indian reservations pursuant to a tribal-state compact entered into for that purpose; and

WHEREAS, the Tribe presently operates gaming establishments on Indian lands in the State of Michigan, and by General Tribal Council Resolution and Tribal Ordinance has adopted rules and regulations governing the games played and related activities at said establishments; and

WHEREAS, the State presently permits and regulates various types of gaming within the State (but outside Indian lands), including casino style charitable gaming such as craps, roulette, and banking card games, as well as a lottery operating instant scratch games, and "pick number" games, most of which would be Class III games if conducted by the Tribe; and

WHEREAS, the Michigan Supreme Court in Automatic Music & Vending Corp. v. Liquor Control Comm., 426 Mich. 452, 396 N.W. 2d 204 (1986), appeal dismissed, 481 U.S. 1009 (1987), and the Michigan Court of Appeals in Primages Int'l of Michigan v. Michigan, No. 136017, slip op., 1993 WL 99733 (Mich. Ap. Apr. 6, 1993), appeal denied, No. 96368 (Mich. May 25, 1993), have held that the statutory exception found at MCL 750.303(2) allows for the play of electronic gaming devices, which includes computerized or electronic games of chance, albeit subject to specified restrictions regarding the mode of play; and

WHEREAS, said casino style table games and electronic gaming devices are, therefore, permitted "for any purpose by any person, organization or entity," within the meaning of IGRA, 25 U.S.C. § 2710(d)(l)(B); and

WHEREAS, a compact between the Tribe and the State for the conduct of Class III gaming satisfies the prerequisite, imposed by the United States Congress by enactment of IGRA, for the operation of lawful Class III gaming by the Tribe on Indian lands in Michigan; and

WHEREAS, the State and the Tribe, in recognition of the sovereign rights of each party and in a spirit of cooperation in the interests of the citizens of the State and the members of the Tribe, have engaged in good faith negotiations recognizing and respecting the interests of each party and have agreed to this Compact.

NOW, THEREFORE, the Tribe and the State agree as follows:

SECTION 1. <u>Purpose and Objectives</u>.

The purpose and objectives of the Tribe and State in making this Compact are as follows:

(A) To evidence the good will and cooperative spirit between the State and the Tribe;

(B) To continue the development of effective working relationships between the State and tribal governments;

(C) To compact for Class III gaming on Indian lands of the Tribe in Michigan as authorized by IGRA;

(D) To fulfill the purpose and intent of IGRA by providing for tribal gaming as a means of generating tribal revenues, thereby promoting tribal economic development, tribal self sufficiency and strong tribal government;

(E) To provide tribal revenues to fund tribal government operations or programs, to provide for the general welfare of the Tribe and its members and for other purposes allowed under IGRA;

(F) To provide for the operation of Class III gaming in which, except as provided in 25 U.S.C. §§ 2710(b)(4) and (d)(2)(A) of IGRA, the Tribe shall have the sole proprietary interest and be the primary beneficiary of the Tribe's gaming enterprise;

(G) To recognize the State's interest in the establishment by the Tribe of rules for the regulation of Class III gaming operated by the Tribe on Indian lands;

(H) To recognize the State's interest in the establishment by the Tribe of rules and procedures for ensuring that Class III gaming is conducted fairly and honestly by the owners, operators, and employees and by the patrons of any Class III gaming enterprise of the Tribe; and

(I) To establish procedures to notify the patrons of the Tribe's Class III gaming establishment(s) that the establishment(s) are not regulated by the State of Michigan and that patrons must look to the tribal

government or to the federal government to resolve any issues or disputes with respect to the operations of the establishment(s).

SECTION 2. Definitions.

For purposes of this Compact, the following definitions pertain:

(A) "Class III gaming" means all forms of gaming authorized by this Compact, which are neither Class I nor Class II gaming, as such terms are defined in §§ 2703(6) and (7) of IGRA. Only those Class III games authorized by this Compact may be played by the Tribe.

(B) "Indian lands" means:

(1) all lands currently within the limits of the Tribe's Reservation;

(2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and

(3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Tribe exercises governmental power.

(C) Notwithstanding subsection 2(B) above, any lands which the Tribe proposes to be taken into trust by the United States for purposes of locating a gaming

establishment thereon shall be subject to the Governor's concurrence power, pursuant to 25 U.S.C. § 2719 or any successor provision of law.

(D) "Tribal Chairperson" means the duly elected Chairperson of the Board of Directors or Tribal Council of the Tribe.

SECTION 3. Authorized Class III Games.

(A) The Tribe may lawfully conduct the following Class III games on Indian lands:

(1) Craps and related dice games;

(2) Wheel games, including "Big Wheel" and related games;

(3) Roulette;

(4) Banking card games that are not otherwise treated as Class II gaming in Michigan pursuant to 25 U.S.C. § 2703(7)(C), and non-banking card games played by any Michigan tribe on or before May 1, 1988;

(5) Electronic games of chance featuring coin drop and payout as well as printed tabulations, whereby the software of the device predetermines the presence or lack of a winning combination and payout. Electronic games of chance are defined as a microprocessor-controlled electronic device which allows a player to play games of chance, which may be affected by an element of skill, activated by the insertion of a coin or currency, or by the use of a

credit, and awards game credits, cash, tokens, or replays, or a written statement of the player's accumulated credits, which written statements are redeemable for cash; and

(6) Keno.

This Compact shall apply to card games that are considered to be Class II games pursuant to 25 U.S.C. § 2703(7)(C) only if those games are expanded beyond their "nature and scope" as it existed before May 1, 1988, and only to the extent of such expansion. The term "nature and scope" shall be interpreted consistent with IGRA, the legislative history of IGRA, any applicable decisions of the courts of the United States and any applicable regulations of the National Indian Gaming Commission.

Any limitations on the number of games operated or played, their location within Indian lands as defined under this Compact, hours or period of operation, limits on wagers or pot size, or other such limitations shall be determined by duly enacted tribal law or regulation. Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the Tribe pursuant to this Compact.

(B) Additional Class III games may be lawfully conducted by mutual agreement of the Tribe and the State as follows:

(1) The Tribe shall request additional games by letter from the tribal Chairperson on behalf of the Tribe to the Governor on behalf of the State. The request shall identify the additional

proposed gaming activities with specificity and any proposed amendments to the Tribe's regulatory ordinance.

(2) The State acting through the Governor shall take action on the Tribe's request within ninety (90) days after receipt. The Governor's action shall be based on:

(a) Whether the proposed gaming activities are permitted in the State of Michigan for any purpose by any person, organization or entity; and

(b) Whether the provisions of this Compact are adequate to fulfill the policies and purposes set forth in the IGRA with respect to such additional games.

SECTION 4. Regulation of Class III Gaming.

(A) The Tribe has enacted a comprehensive gaming regulatory ordinance governing all aspects of the Tribe's gaming enterprise. This Section 4 is intended to supplement, rather than conflict with the provisions of the Tribe's ordinance. To the extent any regulatory requirement of this Compact is more stringent or restrictive than a parallel provision of the Tribe's ordinance, as now or hereafter amended, this Compact shall control.

(B) The regulatory requirements of this Section 4 shall apply to the conduct of all Class III gaming authorized by the Compact. At all times in which it conducts any Class III gaming under this Compact, the Tribe shall maintain, as part of its lawfully enacted

ordinances, requirements at least as restrictive as those set forth herein.

(C) The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, tribal law, IGRA, and all other applicable federal law. This shall include but not be limited to the licensing of consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81 and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violation of this Compact, tribal law, IGRA, or other applicable federal law shall be corrected immediately by the Tribe.

(D) The Tribe may not license, hire, or employ as a key employee or primary management official as those terms are defined at 25 CFR 502.14 and 502.19, in connection with Class III gaming, any person who:

(1) Is under the age of 18; or

(2) Has been convicted of or entered a plea of guilty or no contest to a gambling-related offense, fraud or misrepresentation; or

(3) Has been convicted of or entered a plea of guilty or no contest to any offense not specified in subparagraph (2) within the immediately preceding five years; this provision shall not apply if that person has been pardoned by the Governor of the State where the conviction occurred or, if a tribal member, has been determined by the Tribe to be a person who is not likely again to engage in any offensive or criminal course of conduct and the public good

does not require that the applicant be denied a license as a key employee or primary management official; or

(4) Is determined by the Tribe to have participated in organized crime or unlawful gambling or whose prior activities, criminal record, reputation, habits, and/or associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gaming or to the carrying on of the business and financial arrangements incidental to the conduct of gaming.

(E) All management contracts entered into by the Tribe regarding its gaming enterprise operated pursuant to this Compact shall conform to all the requirements of IGRA, including 25 U.S.C. § 2711, and tribal law. If the Tribe enters into a management contract for the operation of any Class III gaming or component thereof, the State shall be given fourteen (14) days prior written notice of such contract.

(F) All accounting records shall be kept on a double entry system of accounting, maintaining detailed, supporting, subsidiary records. The Tribe shall maintain the following records for not less than three (3) years:

(1) Revenues, expenses, assets, liabilities and equity for each location at which Class III gaming is conducted;

(2) Daily cash transactions for each Class III game at each location at which gaming is conducted, including but not limited to transactions relating to each gaming table bank, game drop box and gaming room bank;

(3) All markers, IOUs, returned checks, hold checks or other similar credit instruments;

(4) Individual and statistical game records (except card games) to reflect statistical drop and statistical win; for electronic, computer, or other technologically assisted games, analytic reports which show the total amount of cash wagered and the total amount of prizes won;

(5) Contracts, correspondence and other transaction documents relating to all vendors and contractors;

(6) Records of all tribal gaming enforcement activities;

(7) Audits prepared by or on behalf of the Tribe; and

(8) Personnel information on all Class III gaming employees or agents, including rotation sheets, hours worked, employee profiles and background checks.

(G) No person under the age of 18 may participate in any Class III game.

(H) The Tribe shall not conduct any Class III gaming outside of Indian lands.

(I) The rules of each Class III card game shall be posted in a prominent place in each card room and must designate:

(1) The maximum rake-off percentage, time buy-in or other fee charged;

(2) The number of raises allowed;

(3) The monetary limit of each raise;

(4) The amount of ante; and

(5) Other rules as may be necessary.

(J) Upon written request by the State, the Tribe will provide information on all consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81 and/or 476), management personnel, suppliers and employees sufficient to allow the State to conduct its own background investigation as it may deem necessary and to make an independent determination as to suitability of these individuals, consistent with the standards set forth in § 4(D) herein.

(K) The regulatory requirements set forth in this section of this Compact shall be administered and enforced as follows:

(1) The Tribe shall have responsibility to administer and enforce the regulatory requirements.

(2) A representative authorized in writing by the Governor of the State shall have the right to inspect all tribal Class III gaming facilities and all tribal records related to Class III gaming,

including those records set forth in § 4(F) herein, subject to the following conditions:

(a) With respect to public areas, at any time without prior notice;

(b) With respect to private areas not accessible to the public, at any time during normal business hours, with 12 hours prior written notice; and

(c) With respect to inspection and copying of all tribal records relating to Class III gaming, with 48 hours prior written notice, not including weekends.

(3) Except as otherwise provided by law or as also allowed by the exceptions defined below, the State agrees to maintain in confidence and never to disclose to any third party any financial information, proprietary ideas, plans, methods, data, development, inventions or other proprietary information regarding the gambling enterprise of the Tribe, games conducted by the Tribe, or the operation thereof which is provided to the State by the Tribe without the prior written approval of a duly authorized representative of the Tribe, provided that the information is marked as confidential information when received by the State. Nothing contained in this § 4(K)(3) shall be construed to prohibit:

(a) The furnishing of any information to a law enforcement or regulatory agency of the United States government;

(b) The State from making known the names of persons, firms or corporations conducting Class III gaming activities pursuant to the terms of this Compact, locations at which such activities are conducted or the dates on which such activities are conducted;

(c) Publishing the terms of this Compact;

(d) Disclosing information as necessary to audit, investigate, prosecute, or arbitrate violations of this Compact or other applicable laws or to defend suits against the State;

(e) Complying with any law, subpoena or court order.

(4) The Tribe shall have the right to inspect State records concerning all Class III gaming conducted by the Tribe consistent with Michigan's Freedom of Information Act.

(5) The Tribe shall reimburse the State for the actual costs the State incurs in carrying out any functions authorized by the terms of this Compact, in an amount not to exceed $25,000.00 per annum. All calculations of amounts due shall be based upon a fiscal year beginning October 1, and ending September 30 unless the parties select a different fiscal year. Payments due the State shall be made no later than sixty (60) days after the beginning of each fiscal year. Payments due the State during any partial fiscal year this Compact is in effect shall be

adjusted to reflect only that portion of the fiscal year. Within sixty (60) days after each fiscal year in which this Compact is in effect, the State shall submit to the Tribe an accounting of actual costs incurred in carrying out any functions authorized by the terms of this Compact. Any amount of said twenty-five thousand dollars ($25,000.00) not expended by the State on said actual costs shall be returned to the Tribe by the State within sixty (60) days after the fiscal year or treated as a pre-payment of the Tribe's obligation during the subsequent fiscal year.

(6) In the event the State believes that the Tribe is not administering and enforcing the regulatory requirements set forth herein, it may invoke the procedures set forth in Section 7 of this Compact.

(L) The Tribe shall comply with all applicable provisions of the Bank Secrecy Act, P.L. 91-508, October 26, 1970, 31 U.S.C. §§ 5311-5314.

SECTION 5. Employee Benefits.

The Tribe shall provide to any employee who is employed in conjunction with the operation of any gaming establishment at which Class III gaming activities are operated pursuant to this compact, such benefits to which the employee would be entitled by virtue of Michigan Public Act No. 1 of 1936, as amended (being MCL 421.1 et seq.), and Michigan Public Act No. 317 of 1969, as amended (being MCL 481.101 et seq.) if his or her employment services were provided to an employer engaged in a business

enterprise which is subject to, and covered by, the respective Public Acts.

SECTION 6. Providers of Class III Gaming Equipment or Supplies.

(A) No Class III games of chance, gaming equipment or supplies may be purchased, leased or otherwise acquired by the Tribe unless the Class III equipment or supplies meet the technical equipment standards of either the State of Nevada or the State of New Jersey.

(B) Prior to entering into any lease or purchase agreement, the Tribe shall obtain sufficient information and identification from the proposed seller or lessor and all persons holding any direct or indirect financial interest in the lessor or the lease/purchase agreement to permit the Tribe to conduct a background check on those persons. The Tribe shall not enter into any lease or purchase agreement for Class III gaming equipment or supplies with any person or entity if the lessor, seller, or any manager or person holding direct or indirect financial interest in the lessor/seller or the proposed lease/purchase agreements determined to have participated in or have involvement with organized crime or has been convicted of or entered a plea of guilty or no contest to a gambling-related offense, fraud or misrepresentation, or has been convicted of or entered a plea of guilty or no contest to any other felony offense within the immediately preceding five years, unless that person has been pardoned.

(C) The seller, lessor, manufacturer, or distributor shall provide, assemble and install all Class III games

of chance, gaming equipment, and supplies in a manner approved and licensed by the Tribe.

SECTION 7. Dispute Resolution.

(A) In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:

(l) The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated and shall specify the factual and legal basis for the alleged noncompliance. The notice shall specifically identify the type of game or games, their location, and the date and time of the alleged noncompliance. Representatives of the State and Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.

(2) In the event an allegation by the State is not resolved to the satisfaction of the State within ninety (90) days after service of the notice set forth in Section 7(A)(1), the party may serve upon the office of the tribal Chairperson a notice to cease conduct of the particular game(s) or activities alleged by the State to be in noncompliance. Upon receipt of such notice, the Tribe may elect to stop the game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The Tribe shall act upon one of the foregoing options within thirty (30) days of receipt of notice from the State. Any

arbitration under this authority shall be conducted under the Commercial Arbitration rules of the American Arbitration Association except that the arbitrators shall be attorneys who are licensed members of the State Bar of Michigan, or of the bar of another state, in good standing, and will be selected by the State picking one arbitrator, the Tribe a second arbitrator, and the two so chosen shall pick a third arbitrator. If the third arbitrator is not chosen in this manner within ten (10) days after the second arbitrator is picked, the third arbitrator will be chosen in accordance with the rules of the American Arbitration Association. In the event an allegation by the Tribe is not resolved to the satisfaction of the Tribe within ninety (90) days after service of the notice set forth in Section 7(A)(1), the Tribe may invoke arbitration as specified above.

(3) All parties shall bear their own costs of arbitration and attorney fees.

(B) Nothing in Section 7(A) shall be construed to waive, limit or restrict any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity.

SECTION 8. Notice to Patrons.

In each facility of the Tribe where Class III gaming is conducted the Tribe shall post in a prominent

position a Notice to Patrons at least two (2) feet by three (3) feet in dimension with the following language:

NOTICE

THIS FACILITY IS REGULATED BY ONE OR MORE OF THE FOLLOWING: THE NATIONAL INDIAN GAMING COMMISSION, BUREAU OF INDIAN AFFAIRS OF THE U.S. DEPARTMENT OF THE INTERIOR AND THE GOVERNMENT OF THE BAY MILLS INDIAN COMMUNITY.

THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN.

SECTION 9. Off-Reservation Gaming.

An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

SECTION 10. Regulation of the Sale of Alcoholic Beverages.

(A) The Tribe hereby adopts and applies to its tribal Class III gaming establishment as tribal law those State laws, as amended, relating to the sale and regulation of alcoholic beverages encompassing the following areas: sale to a minor; sale to a visibly intoxicated individual; sale of adulterated or misbranded liquor; hours of operation; and similar

substantive provisions. Said tribal laws, which are defined by reference to the substantive areas of State laws referred to above, shall apply to the tribal Class III gaming establishment in the same manner and to the same extent as such laws apply elsewhere in the State to off-reservation transactions.

(B) The Tribe, for resale at its Class III gaming establishment, shall purchase spirits from the Michigan Liquor Control Commission, and beer and wine from distributors licensed by the Michigan Liquor Control Commission, at the same price and on the same basis that such beverages are purchased by Class C licensees.

SECTION 11. Effective Date.

This Compact shall be effective immediately upon:

(A) Endorsement by the tribal Chairperson after approval by the General Tribal Council;

(B) Endorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature;

(C) Approval by the Secretary of the Interior of the United States; and

(D) Publication in the Federal Register.

SECTION 12. Binding Effect, Duration, and Severability.

(A) This Compact shall be binding upon the State and the Tribe for a term of twenty (20) years from the

date it becomes effective unless modified or terminated by written agreement of both parties.

(B) At least one year prior to the expiration of twenty (20) years after the Compact becomes effective, and thereafter at least one year prior to the expiration of each subsequent five (5) year period, either party may serve written notice on the other of its right to renegotiate this Compact.

(C) In the event that either party gives written notice to the other of its right to renegotiate this Compact pursuant to subsection (B), the Tribe may, pursuant to the procedures of IGRA, request the State to enter into negotiations for a successor compact governing the conduct of Class III gaming activities. If the parties are unable to conclude a successor compact, this Compact shall remain in full force and effect pending exhaustion of the administrative and judicial remedies set forth in IGRA and/or any other applicable federal law.

(D) The Tribe may operate Class III gaming only while this Compact or any renegotiated compact is in effect.

(E) In the event that any section or provision of this Compact is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect.

SECTION 13. Notice to Parties.

Unless otherwise indicated, all notices, payments, requests, reports, information or demand which any party hereto may desire or may be required to give to the other party hereto, shall be in writing and shall be personally delivered or sent by first-class, certified or registered United States Mail, postage prepaid, return receipt requested, and sent to the other party as its address appearing below or such other address as any party shall hereinafter inform the other party hereto by written notice given at aforesaid:

Notice to the Tribe shall be sent to:

Tribal Chairperson
Bay Mills Tribal Center
Route 1
Brimley, MI 49715

Notice to the State shall be sent to:

Governor's Office
State of Michigan
P.O. Box 30013
Lansing, MI 48909

Office of Attorney General
Treasury Building
First Floor
Lansing, MI 48922

Every notice, payment, request, report, information or demand so given shall be deemed effective upon receipt, or if mailed, upon receipt or the expiration of the third day following the day of mailing, whichever

occurs first, except that any notice of change of address shall be effective only upon receipt by the party to whom said notice is addressed.

SECTION 14. Entire Agreement.

This Compact is the entire agreement between the parties and supersedes all prior agreements, whether written or oral, with respect to the subject matter hereof. Neither this Compact nor any provision herein may be changed, waived, discharged, or terminated orally, but only by an instrument in writing signed by the Tribe and the State.

SECTION 15. Filing of Compact with Secretary of State.

Upon the effective date of this Compact, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan State Legislature and the Michigan Attorney General. Any subsequent amendment or modification of this Compact shall be filed with the Michigan Secretary of State.

IN WITNESS WHEREOF, the Tribal Chairperson acting for the Bay Mills Indian Community and the Governor acting for the State of Michigan have hereunto set their hands and seals.

Dated August 20, 1993	Dated August 20, 1993
BAY MILLS INDIAN COMMUNITY	STATE OF MICHIGAN
By Jeff Parker	By John Engler
Jeff Parker, Chairperson	Governor

APPROVAL BY THE SECRETARY OF THE INTERIOR

The foregoing Compact between the Bay Mills Indian Community and the State of M.:higan is hereby approved this 19th day November, 1993, pursuant to authority conferred on me by Section 11 of the Indian Gaming Regulatory Act, 102 Stat. 2472. I direct that it be promptly submitted to the Federal Register for publication.

Ada E. Deer
Ada E. Deer
Assistant Secretary - Indian Affairs

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30755
Lansing, Michigan 48909

MIKE COX
ATTORNEY GENERAL

December 16, 2010

Via e-mail

Kathryn Tierney
Bay Mills Indian Community
12140 West Lakeshore Drive
Brimley, MI 49715

Dear Ms. Tierney:

This letter follows up on conversations between representatives of the Bay Mills Indian Community (Bay Mills) and representatives of the Governor's office and the Attorney General's office concerning the operation of class III gaming by Bay Mills at a site in Vanderbilt, Michigan (Vanderbilt casino). In brief, Bay Mills asserts that the Vanderbilt property is "Indian lands" and that class III gaming can take place on the property under the Indian Gaming Regulatory Act (IGRA) without the need for any review, approval, or other actions by the state or federal governments because Bay Mills has an approved gaming ordinance and compact with the State.

Our office and the Governor's legal counsel have considered the arguments presented by Bay Mills both in meetings with State representatives and in the written document you provided, a "Request for Indian Lands Opinion" submitted to the Secretary of the U.S. Department of Interior dated July 7, 2009. After due deliberation, the State of Michigan respectfully disagrees with your position and is not persuaded that the Vanderbilt casino is on "Indian lands" as required for lawful gaming under IGRA and Bay Mills' compact with the State.

Bay Mills' reliance on the Michigan Indian Land Claims Settlement Act (MILCSA) is misplaced. Simply stated, the phrase "as Indian lands are held" within Section 107 of the MILCSA does not indicate Congressional intent to vest Bay Mills with broad and unconstrained authority to buy land anywhere within the State to be held by Bay Mills in "restricted fee" status. Even if such status might be obtained through some additional federal action (we are not aware of any tribe in Michigan that holds land in restricted fee status), the mere purchase of real property with MILCSA funds, as apparently Bay Mills now contends, does not convert such property to a restricted fee status. Further, even assuming that the provisions of the MILCSA could vest restricted fee status upon lands properly acquired with the trust moneys, Section 107 only authorizes the purchase of property for the "consolidation and enhancement of tribal landholdings." The purchase of land in Vanderbilt does not meet this requirement.

Additionally, even if the Vanderbilt casino were located on Indian lands, either lands held in trust or

restricted fee lands, Bay Mills' use of this property for class III gaming violates the prohibition against gaming on property acquired by a tribe after October 17, 1988, as set forth in Section 20 of IGRA. We understand your argument that this prohibition only applies to trust lands, and that the Vanderbilt property is not held in trust. But the only court decision we could find that addresses this issue unequivocally held that the prohibition against gaming on after-acquired property included gaming on *both* trust lands and lands held in restricted fee status. *Citizens Against Casino Gambling v Hogen,* 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. July 8, 2008). Thus, even assuming the Vanderbilt property were restricted fee land, IGRA's prohibition is operative here.

These are the three primary points of disagreement with your position. But this is not intended to be an exhaustive analysis and you should be aware that we believe there are multiple deficiencies in the analysis and reasoning underlying your position. And all lead to the conclusion that the operation of this casino is not authorized by IGRA and therefore violates state and federal laws prohibiting gambling, including but not limited to MCL 750.301 *et seq,* and 18 USC § 1955. The State therefore demands that Bay Mills immediately cease operation of all class III gaming at the Vanderbilt casino. If such class III gaming is not terminated after Bay Mills' receipt of this letter, the State will take appropriate action to ensure compliance with its laws and compel closure of the Vanderbilt casino.

Please do not hesitate to call me or Louis Reinwasser if you have any questions.

Sincerely,

S. Peter Manning
S. Peter Manning
Division Chief
Environment, Natural Resources, and Agriculture Division
(517) 373-7540

SPM:neh

EXHIBIT C

National Indian Gaming Commission

September 15, 2010

By First Class Mail

Kathryn L. Tierney
Bay Mills Indian Community
12140 West Lakeshore Dr.
Brimley, MI 49715

Re: Bay Mills Indian Community gaming ordinance amendment

Dear Ms. Tierney:

This letter responds to your request to review and approve an amendment to the Community's gaming ordinance. The amendment was adopted by the Executive Council Resolution No. 10-7-30 on July 30, 2010, and submitted to NIGC on August 2, 2010. The amendment rescinds two previous amendments enacted earlier this year, Resolution Nos. 10-2-9 and 10-5-20. The amendment removes site-specific language in the ordinance in favor of a general definition of Indian lands that is comparable to the provisions in the IGRA.

The ordinance amendment satisfies the requirements of IGRA and NIGC regulations, and this letter constitutes my approval of it. It is important to note that approval is granted only for gaming on Indian lands as defined by IGRA over which the Community has jurisdiction. Thank you for your

submission. The NIGC staff and I look forward to working with you on future gaming issues. If you have questions, please do not hesitate to contact Dawn Sturdevant Baum, Staff Attorney, at 202-632-7003.

Sincerely,

T. Stevens
Tracie L. Stevens
Chairwoman

NATIONAL HEADQUARTERS 1441 L St NW Suite 9100, Washington, DC 20005 Tel: 202.632.7003 Fax: 202.632.7066 WWW.NIGC.GOV

REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St Paul, MN; Tulsa, OK

Bay Mills Indian Community
12140 West Lakeshore Drive
Brimley, Michigan 49715
(906) 248-3241 Fax-(906) 248-3283

AUG -2 2010

RESOLUTION
Resolution No. 10-7-30
Amendment to Gaming Ordinance

WHEREAS: The Bay Mills Indian Community is a federally recognized Indian tribe with a Constitution enacted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. sec. 461, *et seq.*, and

WHEREAS: The Tribe regulates gaming on its tribal lands under a compact with the State of Michigan and under its Gaming Ordinance, and

WHEREAS: The Executive Council has determined that it is in the best interest of the Bay Mills Indian Community to describe the lands upon which gaming may be conducted pursuant to this Ordinance and in conformance with the Indian Gaming Regulatory Act, 25 U.S.C. sec. 2701, *et seq.*

NOW, THEREFORE BE IT RESOLVED, that the Executive Council of the Bay Mills Indian Community hereby amends the Gaming Ordinance by revising Sections 2.30, and 5.5(A), and deleting Section 2.45, and renumbering Sections 2.31 through 2.45, with additions underlined and deletions struck out:

2.30 "**Indian land**" means:

(A) All lands within the limits of the Reservation of the Bay Mills Indian Community; and

(B) Any lands title to which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by United States against alienation and over which the Tribe exercises governmental power.

2.31 "**IRS**" means . . . .

2.32 "**Key employee**" means . . .

2.33 "**License**" means . . .

2.34 "**Manager**" means. . .

2.35 "**National Indian Gaming Commission**" means.. .

2.36 "**Net proceeds**" means. . .

2.37 "**Operator**" means . . .

2.38 "**Ordinance**" means. . .

2.39 "**Participate**" or "**Participation**" or "**Participating**" in any gaming activity means . . .

2.40 "**Person**" means. . .

2.41 "**Player**" means. . .

2.42 "**Primary management official**" means. . .

2.43 "**Progressive gaming**" means. . .

2.44 "**Pull-tabs, punchboards and tip jars**" means . . .

2.45 "**Reservation Raffle**" means. . .

5.5 **Threshold Criteria Which a Potential Operator Must Meet**. The Tribal Commission shall automatically issue the above license to any tribally-owned or tribally-operated Class II or Class III proposed gaming enterprise if:

(A) The proposed gaming activity is to be located on "Indian lands", as defined in Section 2.30 of this Ordinance, and is not prohibited by Section 20 of IGRA ~~land which is held in trust for the Tribe prior to October 17, 1988; or on trust lands which were located within or contiguous to the boundaries of the Reservation on October 17, 1988, on lands taken into trust after October 17, 1988 as a settlement of land claim.~~

AND BE IT FURTHER RESOLVED, that Resolution Nos. 10-2-9 and 10-5-20 are hereby rescinded as redundant and superfluous upon enactment of this Resolution.

APPROVED:

Jeffrey Parker
Jeffrey D. Parker, President
Bay Mills Indian Community
Executive Council

ATTEST:

Richard A. LeBlanc
Richard A. LeBlanc, Secretary
Bay Mills Indian Community
Executive Counsel

CERTIFICATION

I, the undersigned, as Secretary of the Bay Mills Indian Community Executive Council, do hereby certify that the above resolution was adopted and approved at a meeting of the Bay Mills Indian Community Executive Council held at Bay Mills, Michigan, on the 30th day of July, 2010, with a vote of 4 for, 0 opposed, 0 absent, and 1 abstaining. As per provisions of the Bay Mills Constitution, the Tribal President must abstain except in the event of a tie.

Richard A. LeBlanc
Richard A. LeBlanc, Secretary
Bay Mills Indian Community
Executive Counsel

GAMING ORDINANCE
BAY MILLS INDIAN COMMUNITY

Table of Contents

Section 1. Findings, Intent and Policy 1

Section 2. Definitions 3

Section 3. General Provisions. 10
3.1 Authority and Sovereign Powers and Responsibilities 10
3.2 Title, Repeal of Prior Laws, and Effect of Repeal 10
3.3 Classes of Gaming 11
3.4 Construction 11
3.5 Savings Clause 11

Section 4. Tribal Gaming Commission. 11
4.1 Establishment 11
4.2 Location and Place of Business 11
4.3 Duration 11
4.4 Attributes 11
4.5 Recognition as a Political Subdivision of the Tribe 12
4.6 Sovereign Immunity of the Tribal Commission 12
4.7 Waiver of Sovereign Immunity of the Tribal Commission 12
4.8 Sovereign Immunity of the Tribe 13
4.9 Credit of the Tribe 13
4.10 Assets of the Tribal Commission 13
4.11 Membership 13
4.12 Term of Office 14
4.13 Ex-Officio Members 14

4.14 Meetings 15
4.15 Organization 15
4.16 Removal of Members or Vacancies 15
4.17 Conflict of Interest 16
4.18 Powers of the Tribal Commission 16
4.19 Annual Budget 21
4.20 Tribal Commission Regulations 21
4.21 Right of Entrance; Monthly Inspection . . 22
4.22 Investigations 22
4.23 Hearings; Examiner 22
4.24 Appointment of Examiner; Power of Examiner 22
4.25 Staff of Gaming Commission 23
4.26 Quarterly Reports 23

Section 5. Gaming Licenses. 23
5.1 Applicability 23
5.2 License Required 23
5.3 Types of Licenses 23
5.4 Application Procedures 24
5.5 Threshold Criteria Which a Potential Operator Must Meet 25
5.6 License Application Fees 26
5.7 License Tax 26
5.8 Terms of License 26
5.9 Posting of Licenses 26
5.10 Gaming License Renewals 26
5.11 Annual Reports 26
5.12 Closure of a Tribal Licensed Gaming Activity 28

Section 6. Gaming Employee Requirements . . . 28
6.1 Current and Valid Gaming Employee License Required 28
6.2 Application Procedure for Employment . . .28

6.3 Review Procedure 30
6.4 Scope of License 30
6.5 Licensing Period 31
6.6 Renewals 31
6.7 Requirement to Produce License Upon Request. 31
6.8 Suspension or Termination of Employee Licenses 31
6.9 Temporary Suspension of Employee Gaming License 33

Section 7. Provisions of General Applicability to All Operators. 34
7.1 Gaming License Required 34
7.2 Site and Operator Specified 34
7.3 License Not Assignable 34
7.4 Employee Licenses Required 34
7.5 Eligible Licensees 34
7.6 Employee Drug Tests 34
7.7 Regulations Posted or Available 34
7.8 Minimum Age to Play 35
7.9 Minimum Age to Enter Facility 35
7.10 Posting of Rules of Play 35
7.11 Equipment Rental Restrictions 35
7.12 Restrictions on Gaming Apparatus Exchange 35
7.13 Approval of Gaming Materials Required .35
7.14 Requisite Sale and Redemption Value . . .35
7.15 Record Maintenance Requirements 35
7.16 Liquor Sale Restrictions 36
7.17 Form of Payment for Chance to Play 36
7.18 Documentation of Winnings and Losses for Tax Purposes 36
7.19 Taxes, Fees and Reports Timely Transmitted 36

7.20 Response to Regulatory Inquiries 36
7.21 Display of Gaming License 36
7.22 Maintenance of Premises 36
7.23 Facility Security 36
7.24 Cooperation with Law Enforcement 36
7.25 Record Inspection 36
7.26 Gaming Occasion Restrictions 36
7.27 Discrimination Prohibited 37
7.28 Financial Record Review 37
7.29 Use of Net Proceeds 37
7.30 Reporting Requirement Compliance 37
7.31 Tribal Law Violation 37
7.32 Employee Misconduct 37

Section 8. Gross Proceeds Tax 37
8.1 Rate 37
8.2 Separate Accounting Practices 38
8.3 Tax Due Date; Accrual Return and Signature 38
8.4 Annual Periodic Reconciliations 38
8.5 Tax Revenue Distribution 38
8.6 Internal Service Fund 39
8.7 Excess of Receipts over Expenses 39
8.8 Annual Budget 39

Section 9. Operation of Tribally-Owned or Tribally-Operated Games 39
9.1 Management by a Primary Management Official 39
9.2 Use of Net Revenues of Tribally-Owned or Tribally-Operated Gaming Enterprises 4 0
9.3 Audit Requirements 40
9.4 Management Contracts 41

Section 10. Enforcement 43

10.1 Jurisdiction 43
10.2 Prohibited Acts 43
10.3 Criminal Violation 45
10.4 Civil Violation 45
10.5 Cumulative Fines 45
10.6 Purpose of Civil Penalties 46
10.7 Civil Action for Penalties 46
10.8 Seizure of Property 46
10.9 Reporting of Offenders 46

Section 11. Authorized Games 46
11.1 Games Playable 46
11.2 License Required 46

2.28 "**Immediate family**" means, with respect to the person under consideration, a husband or wife, and any other individual who resides in the household of the person under consideration.

2.29 "**In privity with**" means a relationship involving one who acts jointly with another or as an accessory before the fact to an act committed by the other or as a coconspirator with the other.

2.30 "**Indian lands**" means:

(A) All lands within the limits of the Reservation of the Bay Mills Indian Community; and

(B) Any lands title to which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by the United States against alienation and over which the Tribe exercises governmental power.

2.31 "**IRS**" means the United States Internal Revenue Service.

2.32 "**Key employee**" means:

(A) A person who performs one or more of the following functions:

(1) Bingo caller;

(2) Counting room supervisor;

(3) Chief of security;

(4) Custodian of gaming supplies or cash;

(5) Floor manager;

(6) Pit boss;

(7) Dealer;

(8) Croupier;

(9) Approver of credit; or

(10) Custodian of gaming devices including persons with access to cash and accounting records within such devices.

(B) If not otherwise included, any other person whose total cash compensation is in excess of $50,000 per year; or,

(C) If not otherwise included, the four most highly compensated persons in the gaming operation; or

(D) any employee whom the Tribal Commission may by written notice classify as a key employee.

2.33 "**License**" means the official, legal, and revocable permission granted by the Tribal Commission to an applicant to conduct "licensed" gaming activity on the lands of the Tribe.

2.34 "**Manager**" means an entity who has a management contract pursuant to Section 9.4 to operate a tribal gaming enterprise.

2.35 "**National Indian Gaming Commission**" means the National Indian Gaming Commission established by the Indian Gaming Regulatory Act.

2.36 "**Net proceeds**" or "net revenues" means gross gaming revenues of a gaming operation less amounts paid out as, or paid for, prizes, and total gaming-related operating expenses, excluding management fees.

2.37 "**Operator**" means a person which has obtained a gaming license under this Ordinance or which is otherwise permitted by this Ordinance to perform, promote, conduct, or operate any lawful gaming activity on tribal lands at a gaming establishment.

2.38 "**Ordinance**" means the Gaming Ordinance of the Bay Mills Indian Community, as it may from time to time be amended.

2.39 "**Participate**" or "**Participation**" or "**Participating**" in any gaming activity means operating, directing, financing or in any way assisting

in the establishment of or operation of any class of gaming or any site at which such gaming is being conducted, directly or indirectly, whether at the site in person or off the Reservation.

2.40 "**Person**" means any individual, partnership, joint venture, corporation, joint stock company, company, firm, association, trust, estate, club, business trust, municipal corporation, society, receiver, assignee, trustee in bankruptcy, political entity, and any owner, director, officer or employee of any such entity, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, the government of the Tribe, any governmental entity of the Tribe, or any of the above listed forms of business entities that are wholly owned or operated by the Tribe; provided, however, that the term does not include the federal government and any agency thereof. The plural of "person" is "people".

2.41 "**Player**" means a person participating in a game with the hope of winning money or other benefit, but does not include an operator, or any assistant of an operator.

2.42 "**Primary Management Official**" means

(A) The person having management responsibility for a management contract;

(B) Any person who has authority:

(1) To hire and fire employees; or

(2) To set up working policy for the gaming operation; or

(C) The chief financial officer or other person who has financial management responsibility.

2.43 "**Progressive gaming**" means any game in which a cash prize which, not being won by any player during any game, is retained and further monetarily enhanced by the operator or eligible organization, and offered as a prize to players in the next game.

2.44 "**Pull-tabs, punchboards and tip jars**" means a form of gaming in which preprinted cards utilizing symbols or numbers in random order which are uncovered by random choice in expectation of cash prizes if prescribed combinations of symbols and numbers are revealed.

2.45 "**Raffle**" means a form of gaming in which each player buys a ticket for a chance to win a prize with the winner determined by a random method. "Raffle" does not include a slot machine.

2.46 "**State**" means the State of Michigan.

2.47 "**Takeout**" means that portion of a wager which is deducted from or not included in the pari-mutual pool, and which is distributed to people other than those placing wagers.

2.48 "**Tele-bet**" means any system of telephone account wagering on a gaming event.

2.49 "**Tele-bingo**" means a form of lawful gaming in which the game defined as "bingo" is conducted on tribal lands, but through a system combining the use of computers and cable television or telephone lines, and does not require the presence of the players at the site

from where the telecast is originating. The presence of players is required, however, at the site on the reservation where the tele-bingo game is being offered.

2.50 "**Tribal Commission**" means the Gaming Commission described in Section 4 of this Ordinance.

2.51 "**Tribal Court**" means the Tribal Court of the Bay Mills Indian Community.

2.52 "**Tribe**" means the Bay Mills Indian Community.

2.53 "**Twenty-one**", also known as "**blackjack**," is the card game played by a maximum of seven players and one dealer wherein each player plays his hand against the dealer's hand, and the object of which is for a player to obtain a higher total card count than the dealer by reaching 21 or as close to 21 as possible without exceeding that count. The cards have the following value:

(A) Aces count either one or 11, at the player's option.

(B) Kings, queens, and jacks each have a count of ten.

(C) All other cards are counted at their face value.

2.54 "**Wager**" means the initial bet made in any game.

2.55 "**Wagering Office**" means any location within tribal lands at which wagers are placed or accepted by an operator.

Section 3. General Provisions.

3.1 **Authority and Sovereign Powers and Responsibilities**. This ordinance is enacted pursuant to the inherent sovereign powers of the Tribe. The power to enact these ordinances is expressly delegated to the Tribal Council in Article VI of the Tribal Constitution.

3.2 **Title, Repeal of Prior Laws, and Effect of Repeal**. This Ordinance may be cited as the Bay Mills Gaming Ordinance.

All titles, chapters, and sections of the Tribal Code of the Bay Mills Indian Community which pertain to gaming, and are in effect as of the date that this Ordinance becomes operative, are hereby repealed, and all other laws, or parts thereof, inconsistent with the provisions of this Ordinance are hereby repealed.

Repeal of this Ordinance or any portion thereof shall not have the effect of reviving any prior Law, Ordinance, or Resolution theretofore repealed or suspended.

3.3 **Classes of Gaming**. This Ordinance shall divide gaming into the following three Classes: Class I, Class II and Class III.

3.4 **Construction**. In construing the provisions of this Ordinance, unless the context otherwise requires, the following shall apply:

(A) This Ordinance shall be liberally construed to effect its purpose and to promote substantial justice.

(B) Words in the present tense include the future and past tenses.

(C) Words in the singular number include the plural, and words in the plural number include the singular.

(D) Words of the masculine gender or neuter include masculine and feminine genders and the neuter.

3.5 **Savings Clause**. If any section of this Ordinance is invalidated by a court of competent jurisdiction, the remaining sections shall not be affected thereby.

Section 4. Tribal Gaming Commission.

4.1 **Establishment**. The Council hereby charters, creates and establishes the Gaming Commission as a governmental subdivision of the Tribe. The Commission shall be referred to throughout this Ordinance as the Tribal Commission.

4.2 **Location and Place of Business**. The Tribal Commission shall be a resident of and maintain its headquarters, principal place of business and office on the Bay Mills Reservation, Michigan. The Tribal Commission may, however, establish other places of business in such other locations as the Tribal Commission may from time to time determine to be in the best interest of the Tribe.

4.3 **Duration**. The Tribal Commission shall have perpetual existence and succession in its own name, unless dissolved by the Tribal Council pursuant to Tribal law.

4.4 **Attributes**. As a governmental subdivision of the Tribe, the Tribal Commission has been delegated the right to exercise one or more of the substantial governmental functions of the Tribe. In creating the Tribal Commission, it is the purpose and intent of the Tribal Council that the operations of the Tribal Commission be conducted on behalf of the Tribe for the sole benefit and interests of the Tribe, its members and the residents of the Reservation. In carrying out its purposes under this Ordinance, the Tribal Commission shall function as an arm of the Tribe. Notwithstanding any authority delegated to the Tribal Commission under this Ordinance, the Tribe reserves to itself the right to bring suit against any person or entity in its own right, on behalf of the Tribe or on behalf of the Tribal Commission, whenever the Tribe deems it necessary to protect the sovereignty, rights and interests of the Tribe or the Tribal Commission.

4.5 **Recognition as a Political Subdivision of the Tribe**. The Tribe, on behalf of the Tribal Commission, shall take all necessary steps to acquire recognition of the Tribal Commission as a political subdivision of the Tribe, recognized by all branches of the United States Government as having been delegated the right to exercise one or more substantial governmental functions of the Tribe.

4.6 **Sovereign Immunity of the Tribal Commission**. The Tribal Commission is clothed by federal and tribal law with all the privileges and immunities of the Tribe, except as specifically limited by this Ordinance, including sovereign immunity from suit in any state, federal or tribal court. Nothing in this Ordinance shall be deemed or construed to be a waiver

of sovereign immunity of the Tribal Commission from suit, which shall only be waived pursuant to subsection 4.7. Nothing in this Ordinance shall be deemed or construed to be a consent of the Tribal Commission to the jurisdiction of the United States or of any state or of any other tribe with regard to the business or affairs of the Tribal Commission.

4.7 **Waiver of Sovereign Immunity of the Tribal Commission**. Sovereign immunity of the Tribal Commission may be waived only by express resolutions of both the Tribal Commission and the Tribal Council after consultation with its attorneys. All waivers of sovereign immunity must be preserved with the resolutions of the Tribal Commission and the Tribal Council of continuing force and effect. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to secure a substantial advantage or benefit to the Tribal Commission. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds, if any, of the Tribal Commission subject thereto, and shall specify the court having jurisdiction pursuant thereto and the applicable law. Neither the power to sue and be sued provided in Subsection 4.18(z), nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribal Commission other than property specifically pledged or assigned, or a consent to suit in respect of any land within the exterior boundaries of the Reservation or a consent to the alienation, attachment or encumbrance of any such land.

4.8 **Sovereign Immunity of the Tribe**. All inherent sovereign rights of the Tribe as a federally-recognized Indian tribe with respect to the existence and activities of the Tribal Commission are hereby expressly reserved, including sovereign immunity from suit in any state, federal or tribal court. Nothing in this Ordinance, nor any action of the Tribal Commission, shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe; or to be a consent of the Tribe to the jurisdiction of the United States or of any state or any other tribe with regard to the business or affairs of the Tribal Commission or the Tribe; or to be a consent of the Tribe to any cause of action, case or controversy, or to the levy of any judgment, lien or attachment upon any property of the Tribe; or to be a consent to suit with respect to any land within the exterior boundaries of the Reservation, or to be a consent to the alienation, attachment or encumbrance of any such land.

4.9 **Credit of the Tribe**. Nothing in this Ordinance nor any activity of the Tribal Commission shall implicate or any way involve the credit of the Tribe.

4.10 **Assets of the Tribal Commission**. The Tribal Commission shall have only those assets specifically assigned to it by the Council or acquired in its name by the Tribe or by it on its own behalf. No activity of the Tribal Commission nor any indebtedness incurred by it shall implicate or in any way involve any assets of tribal members or the Tribe not assigned in writing to the Tribal Commission.

4.11 **Membership**.

(A) Number of Commissioners. The Tribal Commission shall be comprised of five (5) Tribal Gaming Commissioners consisting of persons appointed by the Executive Council.

(B) Qualification of Commissioners. Each Commissioner must be a member of the Tribe, and, as of the date of appointment, shall not be:

(1) An employee of a gaming enterprise of the Tribe; or

(2) A member of the Gaming Commission staff.

(C) Background Check. Prior to the time that any Tribal Commission member takes office on the Tribal Commission, the Tribe shall perform or arrange to have performed a comprehensive background check on each prospective member, the results of which shall be transmitted to the Executive Council. No person shall serve as a Commissioner if:

(1) His prior activities, criminal record, if any, or reputation, habits or associations:

(a) Pose a threat to the public interest; or

(b) Threaten the effective regulation and control of gaming; or

(c) Enhance the dangers of unsuitable, unfair, or illegal practices, methods, or activities in the conduct of gaming; or

(2) S/he has been convicted of or entered a plea of nolo contendere to a felony or any gaming offense in any jurisdiction or to a misdemeanor within five (5) years of consideration for appointment involving a matter which would be a crime under the provisions of the Michigan Penal Code or the controlled substance provisions of the Michigan Public Health Code; or

(3) S/he has a present interest in the conduct of any gaming enterprise or in any business which is licensed as a vendor to a gaming enterprise of the Tribe; or

(4) S/he has a member of his immediate family employed as a primary management official by any tribal gaming establishment.

4.12 **Term of Office**. Each Commissioner shall serve a term of four years, commencing on January 1st, or until a successor Commissioner is appointed. On January 1, 1998, two Commissioners shall be appointed for a term of two years, and three Commissioners shall be appointed for a term of four years. Thereafter, all Commissioners shall serve four-year terms. The Council's appointment of any Commissioner who is not a member of the Executive Council shall be by resolution.

4.13 **Ex Officio Members**. At the direction of the Tribal Council, any member of the Tribal Council, any Tribal or Bureau of Indian Affairs employee or any other person may be designated to participate, without vote, in Tribal Commission meetings.

4.14 **Meetings**.

(A) Regular Meetings. The Tribal Commission shall hold at least two regular monthly meetings, which shall take place on the first and third Tuesdays of each month. If the meeting date falls on a holiday, it may be rescheduled to another date not in conflict with the regular meetings of the Executive Council on the second and fourth Mondays of each month.

(B) Special Meetings. Special meetings may be called at the request of the Tribal Council, the Chairman of the Tribal Commission or three (3) or more members of the Tribal Commission.

(C) Compensation of Commissioners. An honorarium set by the Executive Council may be paid to Commissioners as compensation.

(D) Quorum. A quorum for all meetings shall consist of four (4) members.

(E) Voting. All questions arising in connection with the action of the Tribal Commission shall be decided by majority vote. The Chairman of the Tribal Commission shall only be entitled to vote to break a tie.

4.15 **Organization**. The Tribal Commission shall develop its own operating procedures and shall elect from within itself a Chairman to direct meetings, a reporter to be responsible for keeping Tribal Commission minutes and transmitting to the Tribal Council a copy of those minutes, handling correspondence and reporting Tribal Commission decisions and such other officers as it deems advisable.

4.16 **Removal of Members or Vacancies**.

(A) Removal.

(1) A Commissioner shall be immediately removed by the Executive Council for any action which bars eligibility for serving in that capacity under subsections 4.11(C)(2), (3), or (4) of this Ordinance.

(2) A Commissioner may be removed by the Council for the following reasons: serious inefficiency, neglect of duty, malfeasance, misfeasance, nonfeasance, misconduct in office, or for any conduct which threatens the honesty and integrity of the Tribal Commission or otherwise violates the letter or intent of this Ordinance. Except as provided below, no Commissioner may be removed without notice and an opportunity for a hearing before the Council, and then only after the Commissioner has been given written notice of the specific charges at least ten days prior to such hearing. At any such hearing, the Commissioner shall have the opportunity to be heard in

person or by counsel and to present witnesses on his behalf. If the Council determines that immediate removal of a Commissioner is necessary to protect the interests of the Tribe, the Council may immediately remove the Commissioner temporarily, and the question of permanent removal shall be determined thereafter pursuant to Tribal Commission hearing procedures. A written record of all removal proceedings together with the charges and findings thereon shall be kept by the Tribal Secretary. The decision of the Council upon the removal of a Commissioner shall be final.

(B) Vacancies. If any Commissioner shall die, resign, be removed or for any reason be unable to serve as a Commissioner, the Council shall declare his position vacant and shall appoint another person to fill the position. The terms of office of each person appointed to replace an initial Commissioner shall be for the balance of any unexpired term for such position, provided, however, that any prospective appointee must meet the qualifications established by this Ordinance.

4.17 **Conflict of Interest**. No person shall serve as a Commissioner if s/he or any member of his immediate family is a primary management official of, or has a financial interest in, any management contract or gaming supply business, or if s/he has any other personal or legal relationship which places him in a conflict of interest.

4.18 **Powers of the Tribal Commission**. In furtherance, but not in limitation, of the Tribal Commission's purposes and responsibilities, and subject to any restrictions contained in this Ordinance or other applicable law, the Tribal Commission shall have and is authorized to exercise by majority vote, the following powers in addition to all powers already conferred by this Ordinance:

(A) To regulate all day-to-day gaming activity within the jurisdiction of the Tribe including tele-bingo and other unusual games.

(B) To promote the full and proper enforcement of all tribal civil and criminal gaming laws and policies.

(C) To enact and enforce such rules and regulations regarding its activities and governing its internal affairs as the Tribal Commission may deem necessary and proper to effectuate the powers granted by this Ordinance and the powers granted and duties imposed by applicable law.

(D) To publish and distribute copies of this Ordinance, Tribal Commission rules, and any Council, Tribal Commission or Tribal Court decisions regarding gaming matters.

(E) To prepare and submit for Council approval proposals, including budget and monetary proposals, which could enable the Tribe to better carry forth the policies and intent of this Ordinance.

(F) To work with the staff of any tribal department, program, project, or operation and to cooperate with the Council or any Council Committee in regard to gaming issues.

(G) Where it is in the best interest of the Tribe, to develop a cooperative working relationship with federal and state agencies and officials.

(H) To arrange for and direct such inspections and investigations as it deems necessary to ensure compliance with this Ordinance and implementing regulations. In undertaking such investigations, the Tribal Commission may request the assistance of tribal gaming staff, federal, state and tribal law enforcement officials, legal counsel and other third parties.

(I) To maintain and keep current a record of new developments in the area of Indian gaming.

(J) To request the assistance of the Tribal Court or Tribal Appellate Court in conducting gaming hearings, defining terms used in this Ordinance or other tribal laws, or in any other matter in which the Tribal Commission deems such assistance to be necessary or proper.

(K) To consider any gaming matter brought before it by any person, organization or business, and all matters referred to it by the Tribal Council.

(L) To obtain and publish a summary of federal revenue laws relating to gaming and to insure compliance with the same.

(M) To arrange for training of Tribal Commission members, tribal employees and others in areas relating to the regulation or operation of gaming.

(N) With the approval of the Council, to employ such advisors as it may deem necessary. Advisors may include, but are not limited to, lawyers, accountants, law enforcement specialists and gaming professionals.

(O) To make recommendations to the Council on the hiring of all supervisory gaming employees.

(P) To promulgate rules and regulations to implement and further the provisions of this Ordinance.

(Q) To approve or disapprove any application for a tribal gaming license.

(R) To consult with and make recommendations to the Council regarding changes in tribal gaming laws and policies.

(S) To administer oaths, conduct hearings, and by subpoena compel the attendance of witnesses and the production of any books, records and papers relating to the enforcement of tribal gaming laws, regulations and policies.

(T) To make, or cause to be made by its agents or employees, an examination or investigation of the place of business, equipment, facilities, tangible personal property, and the books, records, papers, vouchers, accounts, documents

and financial statements of any gaming or enterprise operating, or suspected to be operating, within the jurisdiction of the Tribe.

(U) When necessary or appropriate, to request the assistance and utilize the services of the courts, law enforcement and government officials and agencies, and private parties, in exercising its powers and carrying out its responsibilities.

(V) To examine under oath, either orally or in writing, any person or agent, officer, or employee of any person, with respect to any matters related to this Ordinance.

(W) To delegate to an individual member of the Commission, or to an individual member of the Tribal Council, or to the Tribal Commission or tribal staff, such of its functions as may be necessary to administer these ordinances efficiently; provided, that the Tribal Commission may not re-delegate its power to exercise any of the substantial governmental functions of the Tribe delegated to the Tribal Commission by the Tribe; and provided further, that the Tribal Commission may not delegate its power to promulgate rules and regulations. It may also not delegate to anybody except the Tribal Council or Tribal Court the power to revoke a tribal gaming license permanently. The Tribal Commission may, however, delegate the power to suspend a gaming license temporarily and to close a licensed gaming enterprise for no more than 30 days when its continued operation threatens the public health, welfare or safety.

(X) To close permanently, after notice and a hearing, any game or games which are operating in violation of tribal law.

(Y) To sue or be sued in courts of competent jurisdiction within the United States and Canada, subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity; provided, that no suit shall be brought by the Tribal Commission without the prior explicit written approval of the Tribal Council.

(Z) To purchase, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve and use property and assets of every description, real and personal, tangible or intangible, including money, securities, or any interests therein, rights and services of any kind and description or any interest therein; provided that the Tribal Commission shall have authority to purchase any interest in real property, whether located on or off the Reservation, only with the express, prior written consent of the Tribal Council as to each such action, and title to such real property and property which is to become a fixture or permanent improvement or part of the real property shall be taken in the name of the Tribe or in the name of the United States in trust for the Tribe, and title to all trust and restricted real property shall remain in trust or restricted status.

(AA) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its personal property and assets.

(BB) With the prior permission of the Tribal Council, to borrow money and to make, accept, endorse, execute and issue bonds, debentures, promissory notes, guarantees and other obligations of the Tribal Commission for moneys borrowed, or in payment for property acquired or for any of the purposes of the Tribal Commission and to secure payment of any obligations by secured interest, mortgage, pledge, deed, indenture, agreement or other instrument of trust or by other lien upon, assignment of or agreement in regard to all or any part of the property, rights or privileges of the Tribal Commission.

(CC) To arbitrate, compromise, negotiate or settle any dispute to which it is a party relating to the Tribal Commission's authorized activities.

(DD) To enter into, make, perform and carry out any agreement, partnership, joint venture contract or other undertaking with any federal, state or local governmental agency, tribe, person, partnership, corporation or other association or entity for any lawful purpose pertaining to the business of the Tribal Commission or which is necessary or incidental to the accomplishment of the purposes of the Tribal Commission.

(EE) To invest and reinvest its funds in such mortgages, bonds, notes, debentures, share of preferred and common stock, and any other securities of any kind whatsoever, and property, real, personal or mixed, tangible or intangible, as the Tribal Commission shall deem advisable

and as may be permitted under applicable law, provided that the Tribal Commission shall have authority to invest or reinvest in real property, whether located on or off the Reservation, subject to the restrictions set forth in Subsection 4.18 (DD) above.

(FF) To exercise the tribal power to tax authorized by the Tribal Constitution, and, in accordance with other applicable law, by establishing and collecting gaming fees from gaming enterprises.

(GG) To purchase insurance from any stock or mutual company for any property, or against any risk or hazard.

(HH) To establish and maintain such bank accounts as may be necessary or convenient.

(II) To engage in any and all activities which directly or indirectly carry out the purposes of the Tribe as set forth in this Ordinance.

(JJ) With prior approval of the Tribal Council, to make application and accept grants and other awards from private and governmental sources in carrying out or furthering the purposes of the Tribal Commission or the Tribe.

(KK) To exercise all authority delegated to it or conferred upon it by law and to take all action which shall be reasonably necessary and proper for carrying into execution the foregoing powers and all of the powers vested in this Ordinance as permitted by the purposes and powers herein

stated and which are deemed to be in the best interests of the Tribe, exercising prudent management and good business judgment, all in compliance with applicable law.

4.19 **Annual Budget**. The Tribal Commission shall prepare an annual operating budget for all Tribal Commission activities and present it to the Council by November 15th of each year.

4.20 **Tribal Commission Regulations**.

(A) Tribal Commission regulations necessary to carry out the orderly performance of its duties and powers shall include, but shall not be limited to the following:

(1) Internal operational procedures of the Tribal Commission and its staff;

(2) Interpretation and application of this Ordinance as may be necessary to carry out the Tribal Commission's duties and exercise its powers;

(3) A regulatory system for all gaming activity, including accounting, contracting, management and supervision;

(4) The findings of any reports or other information required by or necessary to implement this Ordinance; and

(5) The conduct of inspections, investigations, hearings, enforcement

actions and other powers of the Tribal Commission authorized by this Ordinance.

(B) No regulation of the Tribal Commission shall be of any force or effect unless it is adopted by the Tribal Commission by written resolution and subsequently approved by a resolution of the Tribal Council and both filed for record in the office of the Tribal Secretary.

(C) The Tribal Court and any other court of competent jurisdiction shall take judicial notice of all Tribal Commission regulations adopted pursuant to this Ordinance.

4.21 **Right of Entrance; Monthly Inspection**. The Tribal Commission and duly authorized officers and employees of the Tribal Commission, during regular business hours, may enter upon any premises of any operator or gaming establishment for the purpose of making inspections and examining the accounts, books, papers, and documents, of any such operator or gaming establishment. Such operator shall facilitate such inspection or examinations by giving every reasonable aid to the Tribal Commission and to any properly authorized officer or employee. A Commissioner or a member of the Tribal Commission's staff shall visit each tribally-owned or tribally-operated gaming establishment during normal business hours for the purpose of monitoring its operation. Such visits shall be unannounced.

4.22 **Investigations**. The Tribal Commission, upon complaint or upon its own initiative or whenever it may deem it necessary in the performance of its duties

or the exercise of its powers, may investigate and examine the operation and premises of any person who is subject to the provisions of this Ordinance. In conducting such investigation, the Tribal Commission may proceed either with or without a hearing as it may deem best, but it shall make no order without affording any affected party notice and an opportunity for a hearing pursuant to Tribal Commission regulations.

4.23 **Hearings; Examiner**. Pursuant to regulations, the Tribal Commission may hold any hearing it deems to be reasonably required in administration of its powers and duties under this Ordinance. Whenever it shall appear to the satisfaction of the Tribal Commission that all of the interested parties involved in any proposed hearing have agreed concerning the matter at hand, the Tribal Commission may issue its order without a hearing. The Tribal Commission may designate one of its members to act as examiner for the purpose of holding any such hearing or the Tribal Commission may appoint another person to act as examiner under subsection 4.24 below. The Tribal Commission shall provide reasonable notice and the right to present oral or written testimony to all people interested therein as determined by the Tribal Commission.

4.24 **Appointment of Examiner; Power of Examiner**. The Tribal Commission may appoint any person qualified in the law or possessing knowledge or expertise in the subject matter of the hearing to act as examiner for the purpose of holding any hearing which the Tribal Commission, or any member thereof, has power or authority to hold. Any such appointment shall constitute a delegation to such examiner of all powers

of a Commissioner under this Ordinance with respect to any such hearing.

4.25 **Staff of Gaming Commission**. Staff of the Gaming Commission are employees of the Bay Mills Indian Community, subject to the governmental personnel policies of the Tribe and supervised by the Commission.

(A) Any staff position which includes responsibility for monitoring, reviewing and investigating the day-to-day gaming operations of a tribally-operated gaming enterprise, or supervision of such monitoring, review, and investigation, must be held by a person who meets the standards contained in subsection 4.11(C) of this Ordinance.

(B) All other staff positions maintained by the Gaming Commission must be held by persons who meet the standards contained in subsection 4.11 (C) (1) -- (3) of this Ordinance.

(C) No staff member may serve as a Commissioner of the Tribal Gaming Commission.

4.26 **Quarterly Reports**. The Tribal Commission shall file a quarterly report to the Council summarizing reports received from each of the Tribe's Primary Management Officials, and making such comments as it deems necessary to keep the Council fully informed as to the status of its various gaming operations.

Section 5. Gaming Licenses.

5.1 **Applicability**. This Ordinance applies to all people engaged in gaming within the jurisdiction of the Tribe. The application for license and the conduct of gaming within the jurisdiction of the Tribe shall be deemed to be a consent to the jurisdiction of the Tribe and the Tribal Court in all matters arising from the conduct of such gaming, and all matters arising under any of the provisions of this Ordinance or other tribal laws.

5.2 **License Required**. No person shall operate Class II or Class III gaming within the jurisdiction of the Tribe unless such gaming is licensed by the Tribe.

5.3 **Types of Licenses**. The Tribe shall issue each of the following types of gaming licenses:

(A) Tribally-Owned or Tribally-Operated Class II. This license shall be required of all tribally-owned or tribally-operated gaming enterprises operating one or more Class II gaming activities.

(B) Tribally-Owned or Tribally-Operated Class III. This license shall be required for all tribally-owned or operated gaming enterprises operating any gaming other than Class I or Class II gaming.

(C) Privately Owned Gaming Not Licensable. No license may be issued for any gaming operation, whether for one or more occasions, which are owned or operated by any person other than the Tribe.

5.4 **Application Procedures**.

(A) Tribally-Owned or Tribally-Operated Class II. Before issuing a license to a tribally-owned or operated Class II gaming activity the Tribal Commission shall:

(1) Review the proposed gaming activity to ensure that all threshold criteria required by this Ordinance shall be met.

(2) Perform the necessary background checks on management contractors, primary management officials and key employees required by this Ordinance.

(3) Review and approve the accounting procedures to be used in such gaming activity.

(4) Take any additional steps necessary to ensure the integrity of such gaming activity.

(B) Tribally-Owned or Tribally-Operated Class III. Before issuing a license to a tribally-owned or operated Class III gaming activity, the Tribal Commission shall:

(1) Review the proposed gaming activity to ensure that all threshold criteria required by this Ordinance shall be met.

(2) Perform the necessary background checks on management contractors,

primary management officials and key employees required by this Ordinance.

(3) Review and approve the accounting procedures to be used in such gaming activity.

(4) Take any additional steps necessary to ensure the integrity of such gaming activity.

(5) Review all aspects of the proposed gaming operation to ensure that it will be in compliance with the provisions of the applicable state/tribal compact.

5.5 **Threshold Criteria Which a Potential Operator Must Meet**. The Tribal Commission shall automatically issue the above license to any tribally-owned or tribally-operated Class II or Class III proposed gaming enterprise if:

(A) The proposed gaming activity is to be located on "Indian lands", as defined in Section 2.30 of this Ordinance, and is not prohibited by Section 20 of IGRA.

(B) The proposed gaming activity is to be played as Class II gaming as defined by this Ordinance and the IGRA.

(C) The proposed gaming activity is authorized by a Tribal Council resolution.

(D) The Tribe or one of its subdivisions will have the sole proprietary interest and the Tribe will

have the exclusive responsibility for the conduct of the proposed gaming activity.

(E) The resolution authorizing the proposed gaming activity provides that:

(1) The revenues of the proposed gaming activity shall be audited annually and copies of those audits will be provided to the Tribal Commission and the National Indian Gaming Commission.

(2) The proposed gaming activity shall comply with all IRS reporting and filing requirements.

(3) All of the proceeds of the proposed gaming activity shall be used for the purposes stated in subsection 9.2.

(4) All contracts for supplies services or concessions for an amount in excess of $25,000 annually, except contracts for legal and consulting services, shall be subject to an annual independent audit.

(5) The construction or maintenance of the gaming facility and the operation of the proposed gaming activity shall be conducted in a manner which the Tribal Commission finds will adequately protect the environment and the public health and safety.

(6) All primary management officials and key employees shall pass the background

checks and obtain the tribal gaming employee licenses required by this Ordinance.

(7) The Tribal Commission shall have the authority to regulate the proposed gaming activity.

(8) The proposed gaming activity shall pay to the National Indian Gaming Commission such fees as federal law may require to be paid.

(9) In the event the gaming activity is Class III gaming, such gaming activity meets all other criteria established by the Tribal-State Gaming compact.

5.6 **License Application Fees**. An application fee shall be required for a or tribally-operated Class II or Class III gaming enterprise. Said fee shall be in the amount of $250 and shall accompany the application.

5.7 **License Tax**. No annual license tax shall be required for a tribally-owned or tribally-operated Class II or Class III gaming operation.

5.8 **Terms of License**. A tribally-owned and tribally-operated Class II and Class III gaming license shall be valid for a period of one year from the date of issuance.

5.9 **Posting of Licenses**. Each operator shall post his tribal gaming license in a conspicuous location at his place of business. If an operator has more than one location, the operator must obtain and post a separate license for each location.

5.10 **Gaming License Renewals**. Each annual tribal gaming license must be renewed every 365 days from the date of issuance. A renewal fee shall be required for a tribally-owned Class II or Class III license in the amount of $100. In order to obtain a renewal of a license, the operator shall submit a written renewal application to the Tribal Commission on the form provided by the Tribal Commission. No renewal application shall be approved until the annual report, required by subsection 5.11, has been properly filed. All renewal applications submitted by a tribally-owned Class II or Class III gaming enterprise shall be approved in 30 days or less unless the Commission believes, based on reasonable grounds, that the enterprise has been or will be operated in violation of tribal, federal or other applicable law or the terms and conditions of the Tribal-State Compact.

5.11 **Annual Reports**. Each operator who possesses an annual Class II or Class III license must file an annual report with the Tribal Commission and the Tribal Council between the 15th and the last day of the 12th month duration of each such license. The report shall be submitted to the Tribal Commission on the annual report form provided by the Tribal Commission and shall include, at a minimum, the following information:

(A) The name, address and telephone number of the operator;

(B) The names, addresses and titles of all of the current managers of the operator;

(C) A description of the gaming activity that it has operated and the total gross sales;

(D) A written copy of any changes it proposes to initiate in its rules;

(E) A statement of the specific date or dates and time or times on which it wishes to operate its gaming activity over the next license period;

(F) The name and addresses of the person who will be designated as primary management official over the next license period;

(G) A statement of any changes in the primary management officials or key employees who will operate the gaming activity over the next license period;

(H) The names and addresses of any employees who the Tribal Commission may determine to be key employees during review of the application;

(I) Written proof that the operator has paid to the National Indian Gaming Commission such fees as federal and tribal law may require it to pay and will continue to do so;

(J) A sworn statement that the operator has complied with the Internal Revenue Codes and Regulations, including written notice of customer winnings, and a statement that the operator shall continue to obey all tribal and federal laws and shall hold the Tribal Commission and the Tribe harmless for failure to do so;

(K) Any location at which the gaming activity has been conducted and any new location which will be established in the next license period;

(L) The number of full-time equivalent people, on an annualized basis, employed by the operation during the past 12 months, together with a projection of the number of full-time equivalent people who are expected to be employed during the next license period;

(M) The total gross revenue of the operator attributable directly or indirectly to tribally licensed gaming activity over the preceding 12 months;

(N) Written proof that the operator has paid to the Tribe the gross receipts tax, and a sworn statement that it will continue to make such payments as may be required during the next license period;

(O) A sworn statement that the operator will continue to comply with all tribal and federal laws applicable to the operator's gaming operation;

(P) A sworn statement that the operator and all of its key employees and management contractors continue to consent to Tribal Court jurisdiction and service of process in all matters arising from the conduct of tribally-licensed gaming activity;

(Q) If the operator is a corporation, a copy of any amendment to its articles of incorporation,

properly certified by the incorporating government, unless a current copy has already been filed with the Tribal Commission.

5.12 **Closure of a Tribally Licensed Gaming Activity**. If the Tribal Commission finds that any tribally owned gaming activity is operating in violation of this Ordinance, or otherwise presents a threat to the public, the Tribal Commission must immediately notify the Tribal Chairman and the Tribal Council. The Tribal Council may close down any tribally owned or operated gaming activity temporarily or permanently at any time with or without cause.

Section 6. Gaming Employee Requirements.

6.1 **Current and Valid Gaming Employee License Required**. Each primary management official and key employee of a Class II or Class III gaming operation must possess a current, valid gaming employee license.

6.2 **Application Procedure for Employment**.

(A) Any person seeking employment with a gaming enterprise licensed by the Commission shall submit an application to the Tribal Commission on such form or in such manner as the Tribal Commission may require. The application form and any changes thereto shall be reviewed and approved by the Bay Mills Indian Community Executive Council prior to utilization.

(B) At a minimum, the application shall contain the following information:

(1) All information required under Part 556 of Title 25, Code of Federal Regulations, as that may from time to time be amended.

(2) The name, address and telephone number of the Primary Management Official for whom the applicant is applying to work and the specific location at which s/he or she is applying to be employed.

(3) The name and job description of the position the applicant is applying for.

(4) The names and addresses of the applicant's living parents, grandparents, spouse, children, brothers, and sisters, including step-, half - and in-law.

(5) A sworn statement that neither the applicant nor any member of his immediate family has a past or current financial interest, other than a salary interest, in any gaming-related enterprise anywhere. If the applicant has any relative who has such a relationship, the applicant shall fully disclose his name and the nature of the relationship.

(6) Written permission giving the Tribal Commission or its designee the right to investigate the applicant's background, including his criminal record, civil and criminal judgments and credit history.

(7) A disclosure of any civil judgments rendered against the applicant, which constitute a collection action for money owed by the applicant, including the case number, a description of the judgment and the name and address of the court involved.

(8) Any other information which might bring into question his fitness to serve as a primary management official or key employee of a licensed gaming operation.

(9) Each application shall be accompanied by a sworn statement that the applicant will submit to the jurisdiction of the Tribe and the Tribal Court, if employed.

(10) Each application shall be accompanied by a sworn statement that the applicant will abide by all applicable tribal and federal laws, regulations and policies.

(11) Each application for a gaming employee license shall be accompanied by an application fee of $10.00.

6.3 **Review Procedure**.

(A) The Tribal Commission or its designee shall forward a copy of each application to a tribal or state law enforcement agency and arrange for that agency to verify in writing the accuracy of the applicant's criminal record. The Commission or its designee shall also contact each reference

provided in the application and take other appropriate steps to verify the accuracy of the other information presented and prepare a report of their findings for the Commission. Once these two reviews are completed, the Commission shall review the findings and either grant or deny the license, if one is required by this Ordinance, or advise the Primary Management Official that the applicant's information has been reviewed and there exists no barrier to employment. The applicant shall be notified in writing of the Commission's decision. If the Commission votes to deny a license, it shall include within this notification the specific reasons for its decision.

(B) A copy of the application, the results of the background checks performed and the Tribal Commission's findings and decision shall be forwarded to the National Indian Gaming Regulatory Commission before a license is issued.

(C) All applications, background checks and Commission decisions shall be retained in the Commission files for a period of at least five (5) years.

6.4 Scope of License.

(A) Any employee gaming licenses issued pursuant to this section shall be effective for only the location, job and employer contained in the application.

(B) Any licensed employee shall apply to have his license transferred to a new location by requesting that transfer in writing to the Tribal Commission in a manner which details the new job and location and the operator for whom s/he proposes to work.

(C) The Tribal Commission may waive the requirements contained in subsections 6.4 (A) and 6.4 (B) for those employees of a licensed operator when the Commission determines:

(1) The position for which the employee is licensed requires carrying out employment responsibilities in more than one location on a regular basis; and

(2) Providing authorization to carry out employment responsibilities in more than one location does not conflict with the Commission's minimum internal control standards and does not compromise the integrity of the licensed gaming operations.

6.5 **Licensing Period**. Any permanent employee gaming license issued pursuant to this section shall be effective for a period of one year from the date of issuance and shall contain the licensee's photograph and shall state on its face the name of the employee, the location at which s/he is licensed to work, the gaming operator who employs him, the date that the license became effective and the date that it expires.

6.6 **Renewals**. A holder of an employee gaming license shall petition to have his license renewed, by applying

to the Tribal Commission for a renewal before his original license has expired and updating all information contained in the original application.

6.7 **Requirement to Produce License Upon Request**. Any person receiving an employee gaming license must carry that license upon his person during all working hours and must produce that license upon the request of any person.

6.8 **Suspension or Termination of Employee License**.

(A) Grounds for Suspension or Termination. The Tribal Commission may suspend or terminate the license of any employee, after notice and an opportunity for a hearing, for any of the following reasons:

(1) The employee has withheld pertinent information on his application;

(2) The employee has made false statements on the application;

(3) The employee has participated in gaming activity which was not authorized by any tribal gaming license;

(4) The employee has attempted to bribe a tribal council member, Commissioner or other person in an attempt to avoid or circumvent tribal law;

(5) The employee has offered something of value or accepted a loan, financing or

other thing of value from a Tribal Commission member, a subordinate employee or any person participating in any gaming activity;

(6) The employee has knowingly promoted, played or participated in any gaming activity operated in violation of tribal or federal law or the tribal/state gaming compact;

(7) The employee has been knowingly involved in the falsification of books or records which relate to a transaction connected with the operation of gaming activity;

(8) The employee has violated any provision of this Ordinance or the rules and regulations of the Tribal Commission;

(9) The employee has been convicted of, or has entered a plea of nolo contendere to, any crime involving gaming, fraud, theft, embezzlement or other activity which, if perpetrated at his operator's place of employment, would injure or pose a threat to the public interest, or the integrity of the gaming activity, or the effective regulation of gaming or enhance the dangers of unfair, unsuitable or illegal gaming practices;

(10) The employee has refused to comply with any lawful order, inquiry or

directive of the Tribal Commission, the Tribal Council, the federal government or any court of competent jurisdiction;

(11) The employee has been convicted of, or entered a plea of nolo contendere to, a crime involving the sale of illegal narcotics or controlled substances; or

(12) The employee has been determined to have present or prior activities, criminal record, if any, or reputation, habits and associations which pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming.

(B) Procedure for Suspension or Termination. Whenever it is brought to the attention of the Tribal Commission that a person has failed to comply with any of the conditions of subsection (A), above, the Tribal Commission or its designee may either undertake an investigation of the gaming enterprise, or serve upon such person or any agent of such person an order to show cause why the employee should not be subject to disciplinary action. Such notice shall state the reason for the order, the time and place for the show cause hearing before the Tribal Commission, and that the person shall have an opportunity to present testimony and cross examine opposing witnesses, and to present any other evidence as to why a disciplinary action should not be issued. The

hearing shall be set for not less than ten (10) days nor more than 14 days from the date of the notice. The hearing shall be governed in all respects in accordance with tribal law and Tribal Commission regulations.

6.9 **Temporary Suspension of Employee Gaming License**.

(A) Any employee gaming license may be temporarily and immediately suspended by the Tribal Commission, the Tribal Court or the Council or its designee for not more than 30 days if any of the following have occurred:

(1) The employee has been charged with a violation of any gaming law.

(2) The employee's continued employment as a primary management official or key employee of a game or gaming enterprise poses a threat to the general public.

(3) The employee has made a material false statement in his license application.

(4) The employee has participated in gaming activity unauthorized by his tribal gaming license.

(5) The employee has refused to comply with any lawful order of the Tribal Commission, the Council, the Tribal Court or the National Indian Gaming Commission.

(B) In the event the Tribal Commission determines that any employee meets any of the criteria stated in subsections 6.9 (A) (1) through 6.9 (A) (5) above or that his non-compliance with this Ordinance is a direct and immediate threat to the peace, safety, morals or health or welfare of the community, the Tribal Commission or its designee shall issue a notice of temporary suspension of his employee gaming license which shall be served upon the employee or any agent of the employee. The order shall state the grounds upon which it is issued and the employee's right to a hearing. The employee shall cease and desist operating in his management position or in his capacity as a key employee immediately upon receipt of the order, but s/he may file a notice of appeal with the Tribal Commission which shall hold a hearing on the order within 14 calendar days of its receipt of the appeal. At the hearing the employee shall have an opportunity to present testimony and cross-examine opposing witnesses, and to present any other evidence as to why a temporary suspension order or an injunction should not be issued. The hearing shall be governed in all respects in accordance with tribal law and Tribal Commission regulations.

Section 7. Provisions of General Applicability to All Operators.

7.1 **Gaming License Required**. Each Class II or Class III gaming activity within the jurisdiction of the

Tribe shall be conducted only by an operator who possesses a current and valid tribal gaming license.

7.2 **Site and Operator Specified**. Each tribal gaming license shall be applicable only to one gaming site and the operator named on such license.

7.3 **License Not Assignable**. No tribal gaming license shall be sold, lent, assigned or otherwise transferred.

7.4 **Employee Licenses Required**. Each management and key employee of a licensed gaming operation shall possess a current and valid tribal gaming employee license.

7.5 **Eligible Licensees**. A tribal gaming license shall be issued only to a person who qualifies therefor under the Ordinance, or to the Tribe or a tribal subdivision.

7.6 **Employee Drug Tests**. Any person employed in a Commission-licensed gaming enterprise may be randomly selected for testing for utilization of marijuana, cocaine, amphetamines, opiates and phencyclidine (PCP). Random drug testing of employees is a mandatory operating procedure for all operators.

7.7 **Regulations Posted or Available**. Each operator shall have a copy of this Ordinance and regulations readily available for inspection by any person at each authorized gaming site.

7.8 **Minimum Age to Play**. In any gaming facility which has a retail alcoholic beverage license, the minimum age to play any Class III game is 21 years of age. In any gaming facility which does not have a retail

alcoholic beverage license, the minimum age to play is 19 years of age.

7.9 **Minimum Age to Enter Facility**. No person, other than a Class III enterprise employee, shall be permitted to:

> (A) Enter the area of any building which has a retail alcoholic beverage license and in which Class III gaming is conducted, if under 21 years of age;
>
> (B) Enter the area of any building which does not have a retail alcoholic beverage license and in which Class III gaming is conducted, if under 19 years of age.

7.10 **Posting of Rules of Play**. Each operator shall post in a conspicuous location near where any gaming activity is being played, or shall otherwise provide the public with an explanation of the rules of play of every specific game s/he operates.

7.11 **Equipment Rental Restrictions**. Each operator of a gaming activity is prohibited from renting or lending gaming equipment to any person.

7.12 **Restrictions on Gaming Apparatus Exchange**. Each operator is prohibited from exchanging pull-tabs, punchboards, sports pools, and twenty-one boxes (shoes). All other gaming equipment may be exchanged without prior approval. Any request for approval shall be made to the Tribal Commission at least 5 days prior to the exchange.

7.13 **Approval of Gaming Materials Required**. Any operator who anticipates the printing, manufacture, or construction of any equipment for gaming activity shall first notify the Tribal Commission of his intention and shall have the finished product approved by the Tribal Commission before it is placed in service.

7.14 **Requisite Sale and Redemption Value**. Gaming chips and other tokens of value shall only be sold and redeemed by the operator and only for full value.

7.15 **Record Maintenance Requirements**. Each licensed gaming operation shall maintain and keep for not less than five (5) years permanent books of accounts and records, including inventory records of gaming supplies, sufficient to establish the gross and net income, deductions, expenses, receipts and disbursements of the enterprise.

7.16 **Liquor Sale Restrictions**. There shall be no sale of liquor at any gaming site without the requisite license for such sale issued under the Tribe's liquor control ordinance.

7.17 **Form of Payment for Chance to Play**. Consideration for the chance to play in any gaming activity shall only be cash, house token or chip, and shall be presented at the time the game is played. No other form of consideration shall be allowed unless the Tribal Commission gives prior written approval.

7.18 **Documentation of Winnings and Losses for Tax Purposes**. Evidence of any win or loss incurred by a player may, upon request, be provided to such player.

7.19 **Taxes, Fees and Reports Timely Transmitted**. Each operator shall pay all applicable taxes and fees, including those assessed by the National Indian Gaming Commission, and file all applicable reports on time.

7.20 **Response to Regulatory Inquiries**. Each operator shall respond immediately to and obey all inquiries, subpoenas or orders of the Tribal Commission, the Tribal Council, the Tribal Court, or the National Indian Gaming Commission.

7.21 **Display of Gaming License**. Each operator shall prominently display at each gaming site a current, valid tribal gaming license.

7.22 **Maintenance of Premises**. Each operator shall, at all times, maintain an orderly, clean, and neat gaming establishment, both inside and out.

7.23 **Facility Security**. Each operator shall provide adequate security to protect the public before, during and after any gaming activity.

7.24 **Cooperation with Law Enforcement**. Each operator shall cooperate at all times with law enforcement personnel.

7.25 **Record Inspection**. Each operator shall make its premises and books and records available for inspection during normal business hours by the Tribal Commission or their designee, and by authorized representatives of the National Indian Gaming Commission.

7.26 **Gaming Occasion Restrictions**. No gaming shall be conducted on special days of observance designated by the Tribal Council.

7.27 **Discrimination Prohibited**. No operator may discriminate on the basis of sex, race, color, or creed in the conduct of any licensed gaming activity. Employment preference for tribal members and other Native Americans shall not constitute discrimination by the operator.

7.28 **Financial Record Review**. Each operator shall keep accurate books and records of all moneys received and paid out and provide authorized representatives of the National Indian Gaming Commission and the Tribal Commission or its designee with copies of or access to the same upon request.

7.29 **Use of Net Proceeds**. All net proceeds of any gaming activity shall be used only in a manner prescribed by this Ordinance.

7.30 **Reporting Requirement Compliance**. Every operator shall comply with all applicable tribal and federal revenue reporting laws.

7.31 **Tribal Law Violation**. It shall be a violation of the Tribe's Criminal Code to violate any provision of this Ordinance, any regulation of the Tribal commission, or any order of the Tribal Court.

7.32 **Employee Misconduct**. Each operator may immediately suspend without pay any employee who is charged with an offense described in subsection 10.2(BB) or any offense related to the sale, possession, manufacture and/or transport of illegal drugs. If a

suspension is made on these grounds, the operator shall also immediately notify the Tribal Commission in writing of the name of the person and the pending charge and advise the Tribal Commission of the outcome of the case. If the employee is convicted or pleads nolo contendere to the charge, his or her employment shall be terminated. An employee terminated under this section for a drug-related conviction may be rehired, provided that such person is eligible for a gaming license, and provided further that such person passes a pre-employment drug screen test, and furnishes a substance abuse assessment by a licensed substance abuse program, and demonstrates compliance with that program's rehabilitation/ counseling plan.

Section 8. Gross Proceeds Tax.

8.1 **Rate**. There is hereby levied upon and there shall be collected from all enterprises an annual tax for the purpose of funding the Tribal Gaming Commission equal to one (1) per cent of the adjusted gross proceeds thereof, as that term is defined in subsection 2.1 of this Ordinance. The tax levied by this section shall be a personal obligation of the taxpayer.

8.2 **Separate Accounting Practices**. Any enterprise which obtains revenue from sources other than activities directly related to gaming, such as the sale of food and beverages, shall keep books to show separately the transactions used to determine the tax levied in this section.

8.3 **Tax Due Date; Accrual, Return and Signature**.

(A) Duty of Enterprise. The enterprise shall, on or before the fifteenth (15th) day of each month, make out a return for the preceding month on a form prescribed by the Tribe, showing the entire amount of adjusted gross proceeds of his gaming activities, and the amount of tax for which it is liable, and shall transmit the return signed by the Primary Management Official, together with payment of the amount of tax owed, on or before the fifteenth day of the month. If the return is prepared by other than said Manager, the return shall so state, and shall give the name and address of the person preparing the return, together with his signature and the name of his employer, if any.

(B) Accrual of Tax. The tax imposed by this section shall accrue to the Tribe on the last day of the month in which the gaming activity occurred.

8.4 **Annual Periodic Reconciliations**. In the event that the annual financial report provided by each enterprise indicates that the amount of adjusted gross proceeds for the year differs from the total of the adjusted gross proceeds reported monthly under sec. 8.3, the enterprise shall file with the Commission a reconciliation return, which indicates the proper amount of the adjusted gross proceeds, and if, additional tax is due, provide the correct amount together with one per cent (1%) penalty interest, compounded monthly, on the amount unreported or underreported, commencing with the month in which the report required by sec. 8.3 was due.

8.5 **Tax Revenue Distribution**. All sums of money received and collected under this section shall be deposited by the Tribe to the credit of an Internal Service Fund to be used solely for the purpose of funding the operations of the Tribal Gaming Commission, in carrying out its responsibilities pursuant to this ordinance, the Indian Gaming Regulatory Act, and the Tribe's Compact with the State of Michigan, published at 58 Fed. Reg. 63262 (Nov. 29, 1993).

8.6 **Internal Service Fund**. The Fund is used to account for the financing of goods and services provided by one department or agency to other departments or agencies of the governmental unit, or to other governmental units, on a cost reimbursement basis.

8.7 **Excess of Receipts over Expenses**. In the event that receipts exceed expenses, as determined by the annual audit, the Internal Service Fund will rebate such excess to enterprises proportionately.

8.8 **Annual Budget**. The Tribal Gaming Commission will prepare and submit for approval by the Executive Council an annual budget.

Section 9. Operation of Tribally-Owned or Tribally- Operated Games.

9.1 **Management by a Primary Management Official**.

(A) The Tribal Council shall appoint one person who shall serve as Primary Management Official at each of its tribally-operated gaming

establishments. The person appointed shall undergo a background check by the Tribal Commission and shall obtain an employee gaming license before commencing work. The Tribal Council shall be the direct supervisor of the Primary Management Official.

(B) The Primary Management Official shall be responsible for managing and overseeing the day-to-day operations of the gaming operation. S/he shall have such authority as the Tribal Council may delegate.

(C) The Primary Management Official shall present a written monthly report to the Tribal Commission and the Tribal Council which details the number of patrons served, the amount of income generated, the numbers of employees working at the establishment, a detailed description of any patron complaints and other problems experienced at the establishment, also a written statement of any changes in key employees or primary management officials and all bills which are 30 days or more past due.

(D) Any patron's cash winnings shall be paid in cash or check and shall be paid within 72 hours after it is won.

(E) The Primary Management Official shall propose and the Tribal Commission shall approve a patron's complaint process. Each tribally-owned and tribally-managed gaming establishment shall post at least one sign in each gaming room informing patrons that they

may file any complaints that they have directly with the Tribal Commission, and advising them of the Tribal Commission's address and phone number.

(F) Each tribally-owned or tribally-operated gaming establishment shall carry sufficient liability insurance to protect the public in the event of an accident. The Tribal Council shall determine the amount of liability insurance required for each gaming establishment.

(G) Each tribally-owned or tribally-operated gaming establishment shall post the rules of play of each game in a conspicuous place in the establishment, and shall make written copies of them available to any member of the general public upon request.

(H) The Primary Management Official shall be personally responsible for seeing that gaming activity is managed in accordance with tribal and federal law and that such gaming activity complies with all IRS reporting requirements.

9.2 **Use of Net Revenues of Tribally-Owned or Tribally-Operated Gaming Enterprises**.

(A) All net proceeds of a tribally-owned or tribally-operated gaming enterprise shall be held in the name of the Tribe. Such net proceeds may only be expended by the Tribal Council by resolution and only for the following purposes:

(1) To fund tribal government operations or programs.

(2) To provide for the general welfare of the Tribe and its members.

(3) To promote tribal economic development.

(4) To donate to charitable organizations.

(5) To help to fund operations of local government agencies.

9.3 **Audit Requirements**.

(A) The Tribal Commission and the Primary Management Official of each tribally-owned or tribally-operated gaming establishment shall obtain an annual outside audit of such gaming establishment. A copy of such audit shall be provided to the Tribal Commission, the Tribal Council and the National Indian Gaming Commission.

(B) Each contract for supplies, services (other than legal and accounting services) or concessions for a contract amount in excess of $25,000.00 annually shall be subject to an independent audit. A copy of such audit will be provided to the Tribal Commission, the Tribal Council and the National Indian Gaming Commission.

9.4 **Management Contracts**.

(A) Each management contract is subject to the prior approval of the National Indian Gaming Commission.

(B) Each management contract shall be approved by the Council with the advice and comment of the Tribal Commission. Before giving final consideration to any proposed management contract, the Council shall direct the Tribal Commission to obtain the following information and submit it to the Council for review:

(1) Background information on the proposed management contractor including its name, its address, the names and addresses of each person or entity having a direct financial interest or management responsibility for the proposed management contractor, and in the case of a corporation, the names and addresses of each member of its board of directors and all stockholders who hold directly or indirectly 10 percent or more of its issued or outstanding stock.

(2) A description of any previous experience that each person listed in subsection 9.1 above has had with other gaming contracts with Indian tribes or with the gaming industry generally, including the name and address of any tribal government or licensing agency with which such person has had a contract relating to gaming.

(3) A complete financial statement of each person listed in subsection 9.4(B)(1) above.

(4) The Tribal Commission shall contact each of the tribal governments and licensing agencies in Subsection 9.4(B)(2) above to determine the performance history of the proposed management contractor.

(5) The Tribal Commission shall arrange to have each proposed management contractor investigated to learn of his personal attributes and to determine whether s/he has a prior criminal record or any pending criminal charges.

(6) The Tribal Commission shall obtain an independent verification of the completed financial statements of each proposed management contractor.

(7) The Commission shall undertake any additional steps it can to determine the character and reputation of each proposed management contractor.

(8) If the Tribal Council, after reviewing the above described information still desires to enter into a management contract with the proposed management contractor, such management contract shall be placed in writing and submitted to legal counsel for review before the Council approves it.

(C) Any management contract approved by the Council must contain at a minimum the

following with respect to the gaming enterprise to which the contract is applicable:

(1) A provision requiring a monthly financial accounting of the gaming enterprise's income and expenses, with an annual financial accounting to be prepared by an independent auditor who is acceptable to the Tribe.

(2) A provision providing the Tribe absolute access to the daily operation of the gaming enterprise and to its books, and the Tribe's absolute right to verify the daily gross revenues of the gaming enterprise at any time.

(3) A provision guaranteeing the Tribe a minimum guaranteed payment which shall always take precedence over the management contractor's right to recoup development and construction costs.

(4) An agreed upon ceiling for the management contractor's development and construction costs.

(5) A provision that the contract shall not exceed the term limit established by federal law.

(6) A provision for termination of the contract and the grounds for termination.

(D) If the Council is satisfied with the information it receives it shall submit its

proposed contract along with all of the above described information to the Chairman of the National Indian Gaming Commission for approval.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
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No. 12-515

In The Supreme Court of the United States

STATE OF MICHIGAN,

Petitioner,

v.

BAY MILLS INDIAN COMMUNITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The five elected members of the Bay Mills Indian Community, in their respective official capacities, the five appointed members of the Bay Mills Tribal Gaming Commission in their respective official capacities, and the Bay Mills Tribal Gaming Commission are additional parties below who are not parties to the proceeding in this Court. *State of Michigan's Amended Complaint*, Petitioner's Appendix, 55a. Because these additional eleven defendants were joined to the case below, subsequent to Bay Mills' interlocutory appeal from the district court, the district court action continues against these defendants, despite the Sixth Circuit ruling and whether this Court grants or denies the petition for writ of certiorari.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	7
I. Abrogation of Tribal Sovereign Immunity Under 25 U.S.C. §2710(d)(7)(A)(ii) is Limited to its Terms	7
A. The Rules Regarding Tribal Sovereign Immunity and Statutory Construction are Well Established	7
B. The Sixth Circuit's Holding Is Consistent with These Well-Established Rules	11
C. Other Courts Have Likewise Construed §2710(d)(7)(A)(ii)	13
1. The Eleventh Circuit Position	14
2. The Ninth Circuit Position	15
3. The Seventh Circuit Position	17
4. The Tenth Circuit Position	18
II. There is no Circuit Conflict Regarding the Effect of Federal Question Jurisdiction Under 28 U.S.C. §1331 on Tribal Sovereign Immunity	22

TABLE OF CONTENTS – Continued

Page

III. In Addition to the Arguments Above, Other Considerations Counsel Against Review 24

CONCLUSION 27

APPENDIX

Opinion and Order Denying Defendant's Motion to Stay Injunction in United States District Court for the Western District of Michigan, Southern Division filed Apr. 14, 2011 ..... Resp. App. 1

Complaint in United States District Court for the Western District of Michigan, Southern Division filed Jul. 15, 2011 ..... Resp. App. 12

TABLE OF AUTHORITIES

Page

CASES:

Bay Mills Indian Community v. Rick Snyder, Case No. 1:11-cv-729 (W.D. Mich.) 24, 26, 27

Block v. North Dakota ex rel. Board of Univ. and School Lands, 461 U.S. 273 (1983) 9

Brown v. GSA, 425 U.S. 820 (1976) 9

C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001) 8

Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994) 16

Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (1997) 15, 16, 17

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 8

Cort v. Ash, 422 U.S. 66 (1975) 10

Duncan v. Walker, 533 U.S. 167 (2001) 12

Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010) 13

Hein v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d 1256 (9th Cir. 2000) 10, 17

High Country Citizens Alliance v. Clarke, 454 F.3d 1177 (1181) (10th Cir. 2006), *cert. denied*, 550 U.S. 929 (2007) 23

Hinck v. U.S., 550 U.S. 501 (2007) 9

TABLE OF AUTHORITIES – Continued

Page

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751 (1998).....8

Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005).....21

Memphis Biofuels, L.L.C. v. Chickasaw Nation Industries, Inc., 585 F.3d 917 (6th Cir. 2007).....23

Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379 (10th Cir. 1997).....18, 19, 20, 21, 22

Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007 (10th Cir. 2007).....22, 23

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).....8

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).....8

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997).....19, 20

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).....8, 9, 10

State of Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999).....10, 14, 15, 21

State of Wisconsin v. Ho-Chunk Nation, 463 F.3d 655 (7th Cir. 2006).....17

State of Wisconsin v. Ho-Chunk Nation, 512 F.3d 921 (7th Cir. 2008).....18

TABLE OF AUTHORITIES – Continued

Page

Tamiami Partners, Ltd. By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Florida, 63 F.3d 1030 (11th Cir. 1995) 10, 15

Turner v. United States, 248 U.S. 354 (1919) 8

United States v. Bormes, ___ U.S. ___, 2012 WL 5475774 ..... 9, 12

United States v. Ron Pair Enter., Inc., 489 U.S. 235 (1989) 12

United States v. State of Oregon, 657 F.2d 1009 (9th Cir. 1989) 25

Vaden v. Discover Bank, 556 U.S. 49 (2009) 17

STATUTES:

§2719 of IGRA 4

9 U.S.C. §1, *et seq.* 17

15 U.S.C. §1681, *et seq.* 9

15 U.S.C. §7201, *et seq.* 13

25 U.S.C. §70, *et seq.* 3

25 U.S.C. §107 3

25 U.S.C. §107(a) 3

25 U.S.C. §107(a)(3) 3

25 U.S.C. §1301, *et seq.* 9

25 U.S.C. §2701, *et seq.* 3

25 U.S.C. §2710(d)(3)(C) 18

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C. §2710(d)(7)(A)(i) 19, 20

25 U.S.C. §2710(d)(7)(A)(ii) ..... *passim*

28 U.S.C §1331 ..... *passim*

28 U.S.C. §1362 25

P.L. 105-143 ..... *passim*

BRIEF IN OPPOSITION

Respondent Bay Mills Indian Community respectfully requests that the State of Michigan's petition for a writ of certiorari be denied.

OPINIONS BELOW

In addition to the opinion of the district court identified by the State, in Pet. App. at 19a-39a, Bay Mills refers the Court to the district court's subsequent opinion and order on April 14, 2011, denying Bay Mills' Motion to Stay Injunction Pending Appeal of its order to the Sixth Circuit Court of Appeals. This opinion explicitly disavows the district court's initial holding that 28 U.S.C. §1331 abrogated Bay Mills' sovereign immunity and provided subject matter jurisdiction to the court. That opinion and order is appended. Resp. App. at 1-11.

INTRODUCTION

Although the petition seeks to present questions of federal jurisdiction and tribal sovereign immunity, the underlying dispute between the Tribe and the State is whether lands purchased by the Tribe with funds made available to the Tribe under the Michigan Indian Land Claims Settlement Act are "Indian lands" as defined in the Tribal-State Compact between Bay Mills and the State. That dispute, however, continues against the Tribe's officials and its

Gaming Commission in the district court and also is the subject of a separate declaratory judgment action brought by the Tribe, in federal court, before the same district court judge, with the Governor of the State as a party, in which there are no questions of federal jurisdiction or tribal sovereign immunity. There are many reasons why the State's petition should be denied, and those are detailed below. But chief among them are the above facts. There is no need for this Court to grant certiorari review of an interlocutory ruling when the underlying dispute between the parties is being resolved in a pending action brought by the Tribe that presents none of the issues for which this Court's review is sought and while the original action proceeds against other defendants below. In addition, and contrary to the State's representations, there are no conflicts in the various circuit courts of appeal regarding whether the jurisdictional requirements of §2710(d)(7)(A)(ii) have been met in the circumstances presented by this case. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

The Bay Mills Indian Community is an Indian tribe located in the northern region of the State of Michigan. It has been continuously acknowledged since European contact and formally recognized in its modern governmental form since November 4, 1936. On December 15, 1997, Congress enacted the Michigan Indian Land Claims Settlement Act, P.L. 105-143

("MILCSA") for the benefit of Bay Mills and four other tribes, which allocated funds awarded to the five tribes due to inadequate compensation for land ceded by the Treaties of March 28, 1836, 7 Stat. 491, and August 2, 1855, 11 Stat. 631, by the Indian Claims Commission pursuant to the Indian Claims Commission Act of 1946, 25 U.S.C. §70, *et seq.* In the Bay Mills portion of the Act (§107), Congress established and funded a Land Trust for the benefit of Bay Mills and directed that lands purchased by Bay Mills with Land Trust funds are to be "held as Indian lands are held." MILCSA §107(a)(3).

In August 2010, pursuant to the authority in §107(a) of MILCSA, Bay Mills purchased land with funds from the Land Trust in the Village of Vanderbilt in Otsego County, Michigan ("Vanderbilt Parcel"). Accordingly, the Parcel is "Indian land," subject to the Tribe's governmental authority and available for gaming activities under the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et seq.*[1] Based on this authority, Bay Mills commenced gaming operations on the Vanderbilt Parcel on November 3, 2010, with 38 electronic games of chance, later expanding the facility to 84 electronic gaming devices.

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[1] In order to promote the economic welfare of its community, Bay Mills entered into a Class III Compact for gaming with the State of Michigan on August 20, 1993, pursuant to IGRA. (*Compact*, Pet. App. 73a-96a) Bay Mills regulates its gaming through tribal law. (*Bay Mills Gaming Ordinance, as amended*, partially reproduced in Pet. App. at 101a-170a.)

In reaction to Bay Mills' activities, the State filed suit on December 21, 2010, in the United States District Court for the Western District of Michigan arguing that Bay Mills could not conduct gaming on the Vanderbilt Parcel because it was not "Indian Lands" under its compact. Such gaming, it contended, was therefore in violation of IGRA.[2] The State thereafter supported a preliminary injunction requested in a companion case filed the following day by Little Traverse Bay Bands of Odawa Indians ("LTBB"), which also sought to end Bay Mills' gaming operations on the Vanderbilt Parcel.

On March 29, 2011, the district court issued the requested preliminary injunction ordering Bay Mills to cease its operations at the facility. (*Opinion and Order Granting Plaintiff Little Traverse Bay Bands of Odawa Indians' Motion for Preliminary Injunction,* Pet. App. 19a-39a.) Bay Mills filed an interlocutory appeal of the preliminary injunction on March 30, 2011, based primarily on jurisdictional grounds and sought a stay of the injunction from the district court pending the appeal. The court denied Bay Mills' motion for stay of the preliminary injunction by written order on April 14, 2011. Notably, in denying

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[2] The State also claimed that the Vanderbilt Parcel was ineligible for gaming under §2719 of IGRA. The Sixth Circuit summarily disposed of this claim, based on Plaintiffs' pleadings and the plain language of §2719. Pet. App. at 9a-10a. The State has raised no challenge to that portion of the order in its petition.

Bay Mills' motion, that court also amended the basis of its holdings regarding tribal sovereign immunity and jurisdiction, making it clear that 28 U.S.C. §1331 does not abrogate tribal sovereign immunity from suit and therefore does not confer subject matter jurisdiction over the Tribe. (*Order,* Resp. App. 4-5.)

On July 15, 2011, Bay Mills filed suit in the same forum (the United States District Court for the Western District of Michigan) against the Governor of the State of Michigan, Rick Snyder, in his individual and official capacities. Bay Mills' complaint seeks declaratory and injunctive relief to preclude the application of Michigan law, on the grounds that the Vanderbilt Parcel is "Indian lands" created by MILCSA, subject to the civil and criminal laws of the Tribe upon its acquisition with Land Trust Funds, and consistent with that term as defined by the Tribe's Compact and IGRA. (*Complaint, Case No. 1:11-cv-729-PLM* (W.D. Mich.), Resp. App. 12-19.) This case was assigned to the same trial judge as a related case. On that same day, the State sought leave to amend its complaint in this proceeding by adding additional defendants – the five members of the Tribe's elected governing body in their official capacities, the five appointed members of the Bay Mills Gaming Commission in their official

capacities, and the Bay Mills Tribal Gaming Commission – and additional claims for relief.[3]

With Bay Mills' appeal pending, the district court entered an order on February 24, 2012, staying all proceedings in the case "pending a decision of the Sixth Circuit Court of Appeals," over the objections of all named defendants. The Court of Appeals for the Sixth Circuit issued its opinion and judgment on Bay Mills' interlocutory appeal on August 15, 2012. (*Opinion and Judgment of United States Court of Appeals*, Pet. App. 1a-18a.) In its order, the Court vacated the preliminary injunction and remanded the case for further proceedings consistent with its opinion.

Upon return of the mandate,[4] the district court issued an order lifting its stay and directing the parties to file a status report in light of the Sixth Circuit's decision. LTBB advised that it would voluntarily seek dismissal of Case No. 1:10-cv-1278, and the district court thereafter dismissed the action with prejudice "for lack of jurisdiction." The district court then dismissed without prejudice all pending motions, which had been filed by all twelve defendants in the State's case. At the direction of the Court,

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[3] On August 9, 2011, the State's motion was granted; the Amended Complaint was docketed that same day. (*Amended Complaint*, Pet. App. 55a-72a.)

[4] The mandate was returned to the district court on September 6, 2012.

renewed motions to dismiss were subsequently filed and are pending.

The State's petition for certiorari was filed that same day, and docketed by the Clerk on October 25, 2012.

REASONS FOR DENYING THE PETITION

I. Abrogation of Tribal Sovereign Immunity Under 25 U.S.C. §2710(d)(7)(A)(ii) is Limited to its Terms.

The State's challenges to the Sixth Circuit's construction of the jurisdictional prerequisites of §2710(d)(7)(A)(ii) are based on a misunderstanding of the Court's ruling, misstatements of the holdings of other court decisions and misconstruction of the federal common law principles of sovereign immunity and statutory construction. Combined, these mischaracterizations cause the State to claim that its petition for certiorari must be granted in order to avoid on-going conflicts between states and Indian tribes throughout the country over gaming controversies. That claim is baseless, as is the legal analysis the State presents in support.

A. The Rules Regarding Tribal Sovereign Immunity and Statutory Construction are Well Established.

Any review of this proceeding must begin with acknowledgement of the status of the Bay Mills

Indian Community as a federally recognized Indian tribe. Due to that status, Bay Mills is a sovereign government, with well-recognized attributes of sovereignty. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831). One attribute of sovereignty enjoyed by Bay Mills is sovereign immunity from unconsented suits. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). This basic principle has been restated as recently as *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). Thus, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,* 523 U.S. 751, 754 (1998). Abrogation of tribal sovereign immunity by Congress must be clear and unequivocal and may not be implied. *See, e.g., Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, *supra*; and *Turner v. United States*, 248 U.S. 354, 358 (1919).

It is a well-established principle of statutory construction that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Accordingly, when Congress abrogates or waives sovereign immunity by way of enactment of a detailed statutory scheme, the remedies provided therein are exclusive. As recently as this month, in

considering the extent to which Congress waived the sovereign immunity of the United States in the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.*, this Court called this tenet: a "basic proposition." *United States v. Bormes*, ___ U.S. ___, 2012 WL 5475774, *5 (U.S.) and continued, "Where a specific statutory scheme provides the accoutrements of a judicial action, the metes and bounds of the liability Congress intended to create can only be divined from the text of the statute itself." Chief Justice Roberts also cited this "well-established principle" in *Hinck v. U.S.*, 550 U.S. 501, 506 (2007), noting that the remedy provided by a statute is exclusive when Congress enacts legislation that contains a specific remedy where no remedy previously existed or where previous remedies were "problematic." *Id.*, citing *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 285 (1983) and *Brown v. GSA*, 425 U.S. 820, 834 (1976).

These rules are no different in the context of tribal sovereign immunity. In *Santa Clara Pueblo v. Martinez*, *supra*, this court considered whether an implied cause of action existed against the tribe and its officials for an alleged violation of the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.* This Court held that no implied cause of action existed under the provisions of the act. It noted that respect for tribal sovereignty as well as deference for Congress' intent to structure the Indian Civil Rights Act to provide a specific remedy (here the privilege of a writ of *habeas corpus* to challenge unlawful detention by a tribe) did

not warrant an intrusion into tribal sovereignty by judicially creating a cause of action and stated, "[W]e tread lightly in the absence of clear legislative intent." 436 U.S. at 60.

Like the Indian Civil Rights Act, IGRA too is a federal statute which provides a limited abrogation of tribal sovereign immunity through the structure of a detailed statutory scheme, with specific and limited remedies. See, *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1246-50 (11th Cir. 1999) (detailing the purpose, intent, structure and remedies of IGRA in making the analysis required to determine the existence of an implied cause of action under *Cort v. Ash*, 422 U.S. 66 (1975)). See also, *Tamiami Partners, Ltd. By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1049 (11th Cir. 1995) ("In the face of these express rights of action [under IGRA], we adhere to '[a] frequently stated principle of statutory construction[:] when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" (citation omitted).) and *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000), relying on *Tamiami*, holding that the existence of such explicit provisions authorizing suits persuaded the Eleventh Circuit that plaintiffs could not sue for other alleged violations of IGRA.

B. The Sixth Circuit's Holding Is Consistent with These Well-Established Rules.

The necessary focus for consideration of the State's petition is the meaning and scope of 25 U.S.C. §2710(d)(7)(A)(ii) of IGRA. Section 2710(d)(7)(A)(ii) contains both specific criteria for jurisdiction and a limited abrogation of tribal sovereign immunity as to when and who may file suit; it reads in pertinent part:

> (7)(A) The United States district courts shall have jurisdiction over –
>
> * * *
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal- State compact . . . that is in effect[.]

As described by the Sixth Circuit, this language:

> is conjunctive – that is, the State or tribal plaintiff must meet *all* of the provision's conditions for jurisdiction to exist, rather than just one or two of them. Thus, §2710(d)(7)(A)(ii) supplies federal jurisdiction only where all of the following are true: (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State

> compact; and (5) the Tribal-State compact is in effect.

Opinion, (Pet. App. 7a.) Under the statute, then, the State's claims that the Bay Mills land in question is not "Indian land" place these claims outside the ambit of 2710(d)(7)(A)(ii)'s grant of jurisdiction, and its concomitant abrogation of tribal sovereign immunity.[5] In the absence of compliance with all the prerequisites of §2710(d)(7)(A)(ii) for subject matter jurisdiction, there is likewise no abrogation of Bay Mills' tribal sovereign immunity.

The Sixth Circuit's conclusion that the remedies provided in §2710(d)(7)(A)(ii) are exclusive, and do not extend to any other type of relief which the State might seek, results from application of the statutory construction principle brought to bear when regarding a comprehensive regulatory scheme, which IGRA clearly is. The State's argument that the contrary conclusion should prevail warrants the observation made by this Court in *United States v. Bormes, supra* at 6: "[t]o hold otherwise – to permit plaintiffs to remedy the absence of a waiver of sovereign immunity in specific detailed statutes by pleading general . . .

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[5] This exercise in statutory construction is exactly what this Court demands of a reviewing court when construing a statute. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (court must give effect, where possible, to every clause and word of a statute) and *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989)(starting point for construing a statue is the plain language of the statute, itself), in addition to limiting relief in such statutes to the specific remedies provided therein.

jurisdiction – would transform the sovereign-immunity landscape."[6] The Sixth Circuit declined the State's invitation and was correct in so doing.

C. Other Courts Have Likewise Construed §2710(d)(7)(A)(ii).

Other Circuits have similarly considered the jurisdictional prerequisites of §2710(d)(7)(A)(ii) as

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[6] The State relies heavily on *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010) in suggesting the alternative approach to general versus specific remedies. But that case is very different from the case at bar. There, the plaintiff challenged the constitutionality of the Oversight Board created by the Sarbanes-Oxley Act, 15 U.S.C. §7201 *et seq*. The Board argued that jurisdiction to review Board decisions was conferred by statute, that such jurisdiction was in the Court of Appeals, and that any other challenge lacked jurisdiction to be heard in federal court. The Court concluded, *inter alia*, that although a Board decision could be challenged in the appeals court, there was no reason to require the plaintiff to go through that process, incur sanctions and/or fines, etc., before raising its constitutional challenge. Thus, in *Free Enterprise Fund*, there was no issue about whether the plaintiff could raise its constitutional challenge in a federal court. It was going to be raised one way or another because of the provision in *Sarbanes-Oxley* allowing review of Board decisions. More importantly, there was no issue about sovereign immunity, unlike here. There, sovereign immunity had been waived (abrogated) because complainants could review Board action, per the statute. To allow an aggrieved party to sue under §1331 and raise its constitutional challenge, as opposed to going through the Board's processes and then seeking judicial review, which would include its constitutional challenge, is an unremarkable result. It certainly does not represent a split in the Circuits about the meaning and interpretation of IGRA and §2710(d)(7)(A)(ii).

both a predicate to subject matter jurisdiction and a resulting abrogation of tribal sovereign immunity. Their holdings are consistent with that of the Sixth Circuit in this case.

1. The Eleventh Circuit Position.

The Eleventh Circuit rejected, in a carefully worded and comprehensive opinion, the State of Florida's efforts to bring suit under §2710(d)(7)(A)(ii) against the Seminole Tribe of Florida, for engaging in Class III gaming without first concluding a Class III gaming compact with the State. In *State of Florida v. Seminole Tribe of Florida*, *supra*, that court construed §2710(d)(7)(A)(ii) as requiring a compact to be in effect in order for a cause of action to be adjudicated. The lack of a compact was a jurisdictional defect that the State could not cure. In so holding, the Eleventh Circuit expressly rejected the State of Florida's argument that §2710(d)(7)(A)(ii) should be construed to evince a broad congressional intent to abrogate tribal sovereign immunity from any state suit that seeks declaratory or injunctive relief for an alleged tribal violation of IGRA. It noted that this "broad reading" of the section:

> directly contradicts two well-established principles of statutory construction: that Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear, and that ambiguities in federal laws implicating

> Indian rights must be resolved in the Indians' favor. [citations and footnotes omitted]

State of Florida v. Seminole Tribe of Florida, supra at 1242.

The Eleventh Circuit similarly rejected in that case the State of Florida's alternative argument that the Seminole Tribe had waived its governmental immunity from the State's suit by electing to engage in the type of gaming – electronic games of chance – which is regulated under IGRA's provisions. It considered the State's argument to be inconsistent with the long-standing rule of this Court that "waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed." *Seminole Tribe* at 1243 [footnote omitted].[7]

2. The Ninth Circuit Position.

Cases arising in the Ninth Circuit have likewise resulted in holdings which limit §2710(d)(7)(A)(ii) causes of action to that section's express terms. For example, the State of California's effort to shut down gaming activities which it claimed violated its Class III compact was dismissed in *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1059-1060

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[7] The Eleventh Circuit had also previously issued an opinion that IGRA does not create implied or private causes of action for every case, simply because an Indian tribe and gaming are involved. *Tamiami Partners v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1049 (11th Cir. 1995).

(1997) (*Cabazon III*). There, the Ninth Circuit reasoned that §2710(d)(7)(A)(ii) limits federal court jurisdiction to those circumstances in which the gaming activity at issue is expressly prohibited by the applicable tribal-state compact. The compacts signed by the Tribes did not cover the slot machines and other banked and percentage games which California sought to enjoin, and the court therefore held no violation of the compacts existed.

The State's assertion at p. 10 that *Cabazon III* is in direct conflict with the Sixth Circuit decision at issue here is erroneous. That case had originally been filed by two Tribes against the State pursuant to the terms of the Class III compact; the compact provided for resolution of any dispute regarding the applicability of California's licensing fees to revenues generated at the Tribes' off-track racing simulcast facilities to be determined in federal court. In a previous decision, the Ninth Circuit held that such fees could not be assessed against the revenues generated at the Tribes' facilities. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) (*Cabazon II*). *Cabazon III* resulted from California's refusal to refund the fees to the Tribes on the grounds that the *Cabazon II* decision was so adverse to the State's interests as to constitute invalidation, and that California was immune from suit under the Eleventh Amendment. All these claims were considered unavailing by the Ninth Circuit, as the State of California had expressly waived its immunity by statute and in its compact. "By agreeing to judicial review by the district court of

all actions under the Compacts and of any interpretation of the Compacts, the State consented to be subject to suit in federal court for the enforcement of a [revenue dispute provision][.]" *Cabazon III supra* at 1057. Clearly, no implied cause of action was held to be derived from §2710(d)(7)(A)(ii) by that decision.[8]

3. The Seventh Circuit Position.

Strict adherence to the prerequisites of §2710(d)(7)(A)(ii) for jurisdiction to proceed in an action against an Indian Tribe has also been required by the Seventh Circuit, contrary to the State's assertions. In *State of Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655 (7th Cir. 2006) (*Ho-Chunk I) rev. on other grounds, Vaden v. Discover Bank*, 556 U.S. 49 (2009), suit by that State against the Nation for ceasing revenue sharing payments was dismissed because the State based its claims on the Nation's failure to arbitrate its dispute under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, rather than on an alleged violation of the Tribal-State compact. The State then filed an amended complaint which alleged that the stoppage of payments by the Nation violated its

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[8] More recently, the Ninth Circuit declined to infer a private cause of action under §2710(d)(7)(A)(ii) in a suit against an Indian tribe brought by a private group of non-member Indians. *Hein v. Capitan Grande Band of Diegueno Mission Indians, supra* at 1260. "Where a statute creates a comprehensive regulatory scheme and provides for particular remedies, courts should not expand the coverage of the statute."

Compact in contravention of §2710(d)(7)(A)(ii); jurisdiction over the State's claims was then held to exist and the Tribe's sovereign immunity as to those claims was abrogated. *State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008) *(Ho-Chunk II)*.[9]

4. The Tenth Circuit Position.

Anchoring the State's arguments for a review of the merits of the Sixth Circuit's decision is the holding in *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997). That decision should not be considered in a vacuum, as it arose from a specific set of circumstances which are unique and unlikely to reoccur: a previous Class III gaming compact, signed by the Governor of the State and approved by the Secretary of the Interior, for the New Mexico Pueblos was declared invalid under state law by the New Mexico Supreme Court. Suit was initiated by the Tribes, seeking a declaration that the compacts continued to be valid, and enjoining the defendant

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[9] In so doing, the Seventh Circuit prescribed the type of violation of the Tribal-State Class III compact which was justiciable under §2710(d)(7)(A)(ii), in order to assure that only compact provisions complying with IGRA could be the subject of an enforcement action, as it was wary that a revenue sharing provision in a compact could run afoul of IGRA. *Ho-Chunk II, supra* at 932. The Seventh Circuit therefore limited the type of compact violations cognizable under §2710(d)(7)(A)(ii) to those listed in §2710(d)(3)(C). *Ho-Chunk II, supra*, at 933-934. The Seventh Circuit is the only appellate court to have addressed this issue.

United States Attorney, the United States Attorney General, and the Secretary of the Interior from taking actions to terminate the Pueblo gaming activities during the pendency of the proceedings; the State of New Mexico was joined as a party by the federal defendants. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997). The Tenth Circuit declared the compacts invalid but acknowledged the sensitivity of the situation, and admonished everyone:

> In so holding, we are acutely aware that while we have reached a decision in this case, as we must, we have by no means solved an extremely difficult and sensitive problem facing tribe members, citizens, and legislators in New Mexico. The only hope for a satisfactory solution is through dialogue and good faith negotiation between all involved parties. We hereby stay the mandate in this case, pending final resolution of this matter, either in this court or the United States Supreme Court.

Pueblo of Santa Ana v. Kelly, supra at 1559.

Several months later, the same judge wrote the Tenth Circuit's decision in the companion case, *Mescalero Apache Tribe v. New Mexico, supra*. That case was filed in 1992 by the Mescalero Apache Tribe under §2710(d)(7)(A)(i),[10] alleging that New Mexico

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[10] The section provides jurisdiction to the district courts over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the

(Continued on following page)

had failed to enter into good faith compact negotiations. Years later, the State sought dismissal of the case by filing a counterclaim based on the *Santa Ana* declaration that the existing compacts were void and unenforceable for not being formalized as required by New Mexico law. The State argued that, because the *Santa Ana* Tribes' compacts were void, the Mescalero compact was also void on the same grounds. The Tribe argued that such a counterclaim was not cognizable under §2710(d)(7)(A)(i) and the Tribe's sovereign immunity was not abrogated by its terms because the section only provides a cause of action to a tribe, not to a state. The Tenth Circuit sidestepped this argument and instead held it had jurisdiction under §2710(d)(7)(A)(ii) to determine the State's claims against the Tribe as to compact validity. In so holding, it pronounced that "[w]hile there is sparse case law on the issue, it appears the majority supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Mescalero, supra*, at 1385.

The Tenth Circuit did not have before it a controversy as to the existence of "Indian lands," and any assertion by the State as to what holding that Court would make regarding that issue is pure speculation.

Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith." 25 U.S.C. §2710(d)(7)(A)(i).

But the Tenth Circuit's pronouncement was based on cases which instead considered whether a tribe voluntarily waives its own sovereign immunity by engaging in gaming under IGRA. *Id.* Based on the lack of supporting authority for the *Mescalero* declaration that §2710(d)(7)(A)(ii) broadly abrogates tribal sovereign immunity, the Eleventh Circuit declined to follow suit, declaring that, "[i]n light of this absence of supporting authority, we find the *Mescalero* panel's claim difficult to credit." *Seminole Tribe, supra*, at 1242.

Since the *Mescalero* opinion was issued, no other federal appellate court decision which has considered the opinion has adopted its construction of §2710(d)(7)(A)(ii). The State's citation at p. 13 to *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005), as in "accord" with *Mescalero* is clear error. No tribe was a party to that case; instead, individuals seeking enrollment in a particular tribe sued Department of Interior and National Indian Gaming Commission ("NIGC") officials to obtain enrollment and to have gaming per capita payments by the Tribe withheld from distribution until the individuals obtained membership status. Citing *Mescalero*, the individuals urged the Ninth Circuit to find jurisdiction over these claims and defendants under IGRA. The Court declined to do so.

The Sixth Circuit declined to follow *Mescalero* on this point for similar reasons: "But *Mescalero* offers virtually no analysis in support of its contrary reading of §2710(d)(7)(A)(ii) – a point which the State, to its credit, concedes here; and to the extent the opinion

does offer any analysis, it mistakenly cites waiver cases rather than abrogation ones." (*Opinion*, Pet. App. 13a.)

Because the *Mescalero* decision is poorly reasoned, and has been rejected by several other circuit courts, there is no need for this Court to wade into this issue. The State's efforts to characterize the Sixth Circuit's opinion as inconsistent with holdings of other Circuits concerning the necessary prudential elements of §2710(d)(7)(A)(ii) and tribal sovereign immunity do not withstand scrutiny.

II. There is no Circuit Conflict Regarding the Effect of Federal Question Jurisdiction Under 28 U.S.C. §1331 on Tribal Sovereign Immunity.

Similarly, the State's assertions regarding federal jurisdiction under the auspices of 28 U.S.C. §1331 misconstrue the Sixth Circuit's holdings and rely on inapposite court decisions. The State wrongfully conflates the possibility of subject matter jurisdiction under 28 U.S.C. §1331 with an automatic abrogation of tribal sovereign immunity. The same confusion was initially experienced by the district court, which granted a preliminary injunction against Bay Mills solely based on 28 U.S.C. §1331. (*Opinion*, Pet. App. 25a.) The district court corrected itself, by stating unequivocally that §1331 does not abrogate Bay Mills' immunity from unconsented suit; it cited with approval *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007) and stated: "Where

another statute provides a waiver of tribal sovereign immunity, or when the tribe has waived its immunity, §1331 may confer subject matter jurisdiction over an action involving a federal question." (Resp. App. 5)

Applying these principles, courts faced with a claim against an Indian tribe founded solely on federal question jurisdiction under §1331 have dismissed those cases on the grounds that the provision does not clearly and unequivocally abrogate sovereign immunity. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2007); *Miner Elec. Inc. v. Muscogee (Creek) Nation, supra*; *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006), *cert. denied*, 550 U.S. 929 (2007). The Sixth Circuit in this case simply followed existing precedent on this matter of law, by acknowledging that federal question jurisdiction under 28 U.S.C. §1331 may exist, but does not provide in and of itself abrogation of Bay Mills' sovereign immunity. (*Opinion*, Pet. App. 11a-12a.)

Even more to the point, there simply does not exist any appellate court decision – and the State does not cite one – which holds that federal-question jurisdiction under §1331 by itself negates an Indian tribe's immunity from suit.

III. In Addition to the Arguments Above, Other Considerations Counsel Against Review.

The ultimate issue in the State's suit against the Tribe is its argument that the land in Vanderbilt is not "Indian lands," over which the Tribe has jurisdiction.[11] (*Amended Complaint*, Pet. App. at 55a-72a.) In its Petition to this Court, the State claims that it merely seeks a forum in which to air this grievance against the Tribe. But there are already multiple forums where the State will be heard.

First, as noted above, a related case involving the same parties and the same factual and legal issues is currently pending below; that case will resolve those issues, without the need for review by this Court of any of the questions the State seeks to present here. That case is *Bay Mills Indian Community v. Rick Snyder*, Case No. 1:11-cv-729 (W.D. Mich.). (*Bay Mills' Snyder Complaint*, Resp. App. 12-19.) There, Bay Mills seeks a declaratory judgment that the laws of the Bay Mills Indian Community apply to its Vanderbilt Parcel. (*Bay Mills' Snyder Complaint*, Resp. App. 19.)

By initiating the *Snyder* lawsuit, Bay Mills has already removed the jurisdictional hurdles to resolving this matter about which the State complains so

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[11] The State's repeated suggestions throughout its *Petition* that the status of the Vanderbilt Parcel has been determined in the courts below are inaccurate. The status of the land is an issue that remains to be resolved on the merits.

vociferously. The existence of tribal jurisdiction over the Vanderbilt parcel is, by Bay Mills' own admission, a federal question. (*Bay Mills' Snyder Complaint*, Resp. App. at 12, (citing 28 U.S.C. §1362 for federal question jurisdiction in an action brought by an Indian tribe).) The State clearly agrees as it notes at p. 2 of its petition that 28 U.S.C. §1331 justifies federal court jurisdiction over such a controversy. In addition, Bay Mills' sovereign immunity is also no longer a jurisprudential barrier prohibiting the adjudication of tribal governmental authority and jurisdiction over the Vanderbilt Parcel. Finally, because the Tribe has initiated the suit seeking declaratory relief. In such cases a tribe can be held to the result. See, *e.g.*, *United States v. State of Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1989) (a tribe voluntarily entering into a lawsuit is bound by the court's orders which result.)

Thus without the issues of tribal sovereign immunity and jurisdiction for which the State seeks this Court's review, the district court, via the *Snyder* case, will be able to resolve the issue of the status of Bay Mills' Vanderbilt property as "Indian land." The resulting determination will effectively resolve the arguments by both the State and the Tribe for and against Bay Mills' gaming activities on the property. Should the court determine that the lands are not "Indian lands" under MILCSA, then the Tribe has no governmental authority over the property; its ability to regulate gaming on that property is therefore plainly foreclosed. Should the court find that Bay Mills has correctly implemented the plain language of

MILCSA, and the property is "Indian lands," the State could then clearly proceed against Bay Mills under §2710(d)(7)(A)(ii) of IGRA for any alleged compact violations which it claims have or will occur as all the jurisdictional prerequisites for abrogation of tribal sovereign immunity under that section will then be met. In either case, the matter will be conclusively resolved without the need for review by this Court.

In addition to proceeding in the *Snyder* case, the State is still able to continue its case in the district court against the additional defendants named in its Amended Complaint. An adverse judgment against them in subsequent proceedings would permanently enjoin the officials from "permitting and conducting class III gaming" just as the relief requested would have impacted the Tribe. The State's concerns expressed in its petition at p. 17 regarding the "different political ramifications" of proceeding against Bay Mills officials rather than the tribe is a laudable but unnecessary consideration. By electing to amend its complaint to add these defendants, the State has chosen to accept whatever political ramifications might result. And, as was noted above, whether the named defendant is Bay Mills or its officials, the State seeks to shut down permanently Bay Mills' economic activities in Vanderbilt; such action is "friction" enough. Further, any of the State's concerns over differing political ramifications of an *Ex parte Young* action against the Tribe's officers should have been lessened greatly when Bay Mills itself took action against its governor in the *Snyder* case.

Each of these proceedings – *Bay Mills v. Snyder* and the proceedings against the additional defendants in this action below – provides an opportunity for both parties to seek and receive complete relief on the merits of their arguments. Moving forward in either case would cause no hardship or prejudice to the State or otherwise limit its opportunity to be heard. In short, there is no reason to grant the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: November 26, 2012

Respectfully submitted,

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Counsel for Respondent

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

-v-

BAY MILLS INDIAN COMMUNITY,
Defendant.

– AND –

LITTLE TRAVERSE BAY
BAND OF ODAWA INDIANS,
Plaintiff,

-v-

BAY MILLS INDIAN COMMUNITY,
Defendant.

No. 1:10-cv-1273
HONORABLE
PAUL L. MALONEY

No. 1:10-cv-1278
HONORABLE
PAUL L. MALONEY

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO STAY INJUNCTION

(Filed Apr. 14, 2011)

On March 29, 2011, this Court issued a preliminary injunction enjoining the operation of Defendant Bay Mills Indian Community's ("Bay Mills") gaming operation in Vanderbilt, Michigan. (ECF No. 33 "Order".[1]) Bay Mills filed a notice of interlocutory

[1] Except where specifically noted, all references to docket numbers in the electronic case file are to the docket sheet and record in 1:10-cv-1273.

appeal (ECF No. 39) and a motion to stay the injunction pending appeal (ECF No. 40). Plaintiffs Little Traverse Bay Band of Odawa Indians ("Little Traverse Bay") and State of Michigan ("State") filed responses. (ECF Nos. 43 and 44.) The parties have not requested oral argument and, having reviewed the briefs, oral argument is not necessary. *See* W.D. Mich. LCivR 7.2(d) and 7.3(d).

LEGAL FRAMEWORK

A court may suspend an injunction while an appeal is pending from an interlocutory order granting an injunction. Fed. R. Civ. P. 62(c); *see Brown v. City of Upper Arlington*, ___ F.3d. ___, 2011 WL 1085642, at * 5 (6th Cir. Mar. 25, 2011) ("The traditional way to obtain a stay after the dismissal of a request for an injunction is under Civil Rule 62(c), which allows a court to 'suspend, modify, restore, or grant' an injunction pending appeal.") When determining whether to issue a stay of an injunction, courts consider the same four factors used to evaluate whether to grant a preliminary injunction: (1) whether the party requesting the stay has made a strong showing that he or she is likely to succeed on the merits, (2) whether the party requesting the stay will be irreparably harmed absent a stay, (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) whether the public interest supports the issuance of a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (holding that the factors for issuing a stay under Fed. R.

Civ. P. 62(c) and Fed. R. App. P. 8(a) are the same); *see also Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) ("In determining whether a stay should be granted under Fed. R. App. P. 8(a), we consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction.")

ANALYSIS

A. Likelihood of Success on the Merits

Bay Mills makes two claims under this first factor. First, Bay Mills argues this court lacks jurisdiction over Bay Mills. Second, Bay Mills argues this court erred as a matter of law that the Michigan Indian Land Claim Settlement Act ("MILCSA") § 107(a)(3) did not authorize Bay Mills to purchase land in Vanderbilt, Michigan.[2]

1. Jurisdiction

Bay Mills asserts this court lacks jurisdiction because it is immune from suit. On the face of the jurisdictional allegations in the complaint, and because Bay Mills neglected to address all of the jurisdictional allegations in its response, this court found

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[2] Bay Mills also argues Little Traverse Bay lacks standing because the tribe has not established an actual injury. This argument overlaps with Little Traverse Bay's assertion of irreparable injury.

"[f]or the purpose of deciding this motion, this Court has jurisdiction over the subject matter in the complaint." (Order, 6.) The Sixth Circuit Court of Appeals has acknowledged that courts must frequently make decisions whether to grant or deny preliminary injunction motions on the basis of "incomplete factual findings and legal research." *Michigan Coal.*, 945 F.2d at 153 (quoting *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978)). Bay Mills now opts to address, for the first time, the jurisdictional allegations in the complaint unrelated to 25 U.S.C. § 2710(d)(7)(A)(ii).[3] Bay Mills has never filed a motion to dismiss for lack of jurisdiction.[4] Through this motion to stay, Bay Mills has functionally asked this court to predict whether the Sixth Circuit will dismiss the complaint for lack of jurisdiction, for reasons never fully briefed or presented here.

Bay Mills has demonstrated a likelihood of success on the merits of the claim that neither 28 U.S.C. § 1331 or 28 U.S.C. § 1362, standing alone, provides

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[3] Bay Mills characterized the complaint as relying on § 2710(d)(7)(A)(ii) as the sole authority to abrogate its immunity from suit. (ECF No. 14 Bay Mills Resp., 8.) Bay Mills did not explicitly address the other statutory bases for jurisdiction asserted in the complaint: 28 U.S.C. § 1331 and 28 U.S.C. § 1362. (Compl. ¶ 3 in 1:10-cv-1278.) Neither did Bay Mills address whether 25 U.S.C. § 2719, the statutory basis for the third count in the complaint, would provide a basis for jurisdiction. (*Id.* ¶¶25-29.)

[4] At oral argument, counsel for Bay Mills expressed his intention to file full written motions on both standing and jurisdiction after a scheduling order issued.

a basis for this court to exercise subject matter jurisdiction over the action. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). "[A]brogation of tribal-sovereign immunity must be clear and may *not* be implied." *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) (emphasis in original) (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). The federal question statute, § 1331, does not clearly abrogate tribal immunity. *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007). Section 1362 authorizes federal jurisdiction over civil suits brought by Indian tribes, not suits against Indian tribes, and the statute does not explicitly waive sovereign immunity. *See Blatchford v. Native Village*, 501 U.S. 775, 786 n. 4 (1991).

Bay Mills has not established a substantial likelihood of success on the merits on its jurisdictional argument when other statutes are considered. Where another statute provides a waiver of tribal sovereign immunity, or when the tribe has waived its immunity, § 1331 may confer subject matter jurisdiction over an action involving a federal question. *Miner Elec.*, 505 F.3d at 1011. Whether the provisions of the Indian Gaming Regulatory Act ("IGRA") identified in the complaint, 25 U.S.C. § 2710(d)(7)(A)(ii) and § 2719,

provide a basis for jurisdiction is a difficult question. This court has previously held, in a remarkably similar situation involving these same two parties, that § 2710(d)(7)(A)(ii) provides jurisdiction over a suit where the allegation is that the gaming operation is not on Indian land. *See Bay Mills Indian Cmty. v. Little Traverse Bay Band of Odawa Indians*, No. 5:99-cv-88 (W.D. Mich. Aug. 30, 1999) (Bell, J.) (opinion).[5] The majority of courts to consider the issue have found that the "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions at issue and where only declaratory or injunctive relief is sought." *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385-86 (10th Cir. 1997) (collecting cases).

2. MILCSA § 107(a)(3)

Bay Mills asserts three errors in the manner in which this court interpreted MILCSA § 107(a)(3). Bay Mills' assertions do not persuade this court that its prior conclusion was erroneous. The statutory language at issue has a plain and obvious meaning. The alternative interpretations suggested by Bay Mills, in order to establish that the provision is ambiguous, render portions of the statutory provision as mere surplusage. Although the preference for avoiding surplusage constructions is not absolute, Bay Mills has not established that such a situation is present

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[5] ECF No. 4-7.

here. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94-95 (2001). Because the court does not find the statute ambiguous, there was no need to review the legislative history of MILCSA. *See Ex parte Collett*, 337 U.S. 55, 61 (1949) ("The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.'") (quoting *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945)).

B. Irreparable Harm to Bay Mills

Bay Mills argues its substantial investment in the facilities in Vanderbilt are suffering. Furthermore, its reputation and goodwill in the community are suffering.

Any irreparable harm to Bay Mills from the injunction in this situation must arise from something other than the injunction on its gaming operations. Prior to the opening of the casino in Vanderbilt, Bay Mills argued to the Department of Interior and the National Indian Gaming Commission, without success, its claim that any land purchased pursuant to MILCSA § 107(a) was necessarily "Indian land." (*See* ECF No. 36 – Department of Interior Opinion Letter, 3 n. 1.) Bay Mills made three separate requests, but withdrew the request each time before

any final decision was issued. (*Id.*) Bay Mills also discussed with the State of Michigan whether its Vanderbilt gaming operation complied with the IGRA. After reviewing Bay Mills' submissions, the Attorney General for the State of Michigan sent Bay Mills a letter demanding that Bay Mills cease operation of the Vanderbilt casino. (ECF No. 4-6 12/16/2010 Letter.) Although it was aware its legal position, that the Vanderbilt property was Indian land, was tenuous, Bay Mills opted to build, begin operating, and continue its gaming operations in Vanderbilt. After these two suits were filed, Bay Mills expanded its operation from 38 to 84 slot machines. (Order, 4.) When a party is aware of the risk of going forward, the assumed risk cannot form the basis for a claim for irreparable harm. *See United States v. Edward Rose & Sons*, 384 F.3d 258, 264 (6th Cir. 2004) (finding the party enjoined would not suffer irreparable injury when the construction of apartments was halted because the design violated the disability portions of the Fair Housing Act and the party enjoined had been warned of that fact); *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (per curiam) ("[W]hen a party knew of the risk that it undertook when it undertook the enjoined activity, monetary losses from [] complying with the injunction will seldom be irreparable."); *Ty v. Jones Group, Inc.*, 237 F.3d 891, 903-04 (7th Cir. 2001) (upholding the magistrate judge's balancing of harms where the magistrate judge excluded from the irreparable harm calculation any burden the defendant voluntarily assumed when he proceeded in the face of a known

risk); *South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*, 145 F. Supp.2d 446, 501-02 (D.N.J. 200 1) ("It is clear from the record that SLC was aware of the NJDEP's Title VI obligations and of the demographics of the neighborhood and the residents' concerns about potential civil rights violations prior to its construction of the facility, and yet chose to proceed with construction of the facility. SCL cannot now argue that it will suffer irreparable harm based on its own assumption of the risk in constructing the facility."); *Floralife, Inc. v. Floraline Int't, Inc.*, 633 F.Supp. 108, 114 (N.D. Ill. 1985) ("In assessing the defendant's irreparable harm, we exclude the burden it voluntarily assumed by proceeding in the face of a known risk.").

C. Irreparable Harm to Little Traverse Bay

Bay Mills argues Little Traverse Bay has not offered sufficient proof that Bay Mills' casino in Vanderbilt has caused Little Traverse Bay's casino in Petoskey to lose revenue. Experts' opinions presented by both Bay Mills and Little Traverse Bay concluded that the Bay Mills' casino in Vanderbilt would cause a reduction in gambling revenue for Little Traverse Bay's casino in Petoskey. (Order, 14-15.) Bay Mills' reliance on *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910 (6th Cir. 2002) does not require a different conclusion. The standing issue in that case was presented in the context of a summary judgment motion, after remand, where the issue on remand was whether the Tribe could establish

injury for the purpose of standing. *Id.* at 916. In contrast, this action is in the very early stage of litigation, where no discovery has yet occurred. In further contrast to the proceedings here where affidavits have been submitted, the circuit court noted the Sault St. Marie Tribe "[i]n lieu of affidavits or similar evidence supporting its claim of competitive injury, the Sault Tribe invited the district court to take judicial notice, in effect, of the undisputed fact that its casino at St. Ignace is only 40 miles away from Little Traverse's casino in Petoskey." *Id.* at 915. At this early stage in the litigation, the evidence in the record supports Little Traverse Bay's claim for irreparable injury and for injury-in-fact standing.

D. Public Interest

Bay Mills insists the Vanderbilt community will suffer if the injunction remains in place during its appeal. The individuals employed by the casino will lose their source of income. Local businesses will suffer from the loss of tourists. Local governments suffer through the loss of revenues.

This factor weighs in favor of maintaining the injunction. Assuming the casino is operating illegally, the benefits enjoyed by the local community cannot be properly considered. Wages and revenue streams from an illegal enterprise are, at best, ill-gotten booty. Furthermore, by operating an illegal casino, Bay Mills invites the general public to violate Michigan's prohibition on attending a gambling house. The

competition between Bay Mills' casino in Vanderbilt and Little Traverse Bay's casino in Petoskey, even if not zero-sum, will result in reduced revenues for the casino in Petoskey, which results in reduced revenue for the State. (Order, 16.)

CONCLUSION

Bay Mills is not entitled to a stay of the injunction pending appeal. The four factors the court must consider favor maintaining the injunction.

ORDER

For the reasons provided in the accompanying opinion, Bay Mills' motion to stay the injunction pending appeal (ECF No. 40) is **DENIED**. **IT IS SO ORDERED.**

Date April 14, 2011

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States
District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAY MILLS INDIAN
COMMUNITY
Plaintiff,

-vs-

No. 1:11-cv-

GOVERNOR RICK SNYDER,
individually and in his
official capacity,
Defendant.
_____/

COMPLAINT

(Filed Jul. 15, 2011)

The Bay Mills Indian Community, by and through its counsel, complains and alleges as follows:

JURISDICTION

1. This Court's jurisdiction is invoked pursuant to:

a. 28 U.S.C. §1362, as the plaintiff is an Indian tribe and the matter in controversy arises under the Constitution, laws and treaties of the United States; and

b. 28 U.S.C. §§2201 and 2202, as plaintiff seeks a declaratory judgment and such further relief as may be warranted under the circumstances of this case.

PARTIES

2. Plaintiff Bay Mills Indian Community is a federally recognized Indian tribe.

3. Defendant Rick Snyder is Governor and Chief Executive Officer of the State of Michigan.

VENUE

4. Defendant Rick Snyder maintains his official office in Lansing, Michigan. Venue is properly in this Court under 28 U.S.C. §1391(b)(1).

GENERAL ALLEGATIONS

5. The Bay Mills Indian Community exercises powers of self-government over its lands and people pursuant to its Constitution, as amended.

6. The Constitution of the Bay Mills Indian Community was adopted on September 15, 1936, by referendum vote, pursuant to the provisions of § 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476.

7. The jurisdiction of the Bay Mills Indian Community is established in Article II of its Constitution, defined as extending to all territory within the original confines of its Reservation purchased under the Act of June 19, 1860 (12 Stat. 58) and to such other land within or without said boundary lines as may be added thereto under any law of the United States, except as otherwise provided by law.

8. The laws enacted by the governing body of the Bay Mills Indian Community, both civil and criminal, apply to the lands described in Article II of its Constitution.

9. As a federally recognized Indian Tribe, the Bay Mills Indian Community and its people and property are subject to the plenary power of the government of the United States, as that is from time to time expressed by laws of Congress, decisions of the federal judiciary, and actions of the Executive Branch.

10. Absent express authorization by Congress the laws of the State of Michigan do not generally apply within the territory of the Bay Mills Indian Community.

11. The Michigan Indian Land Claims Settlement Act ("MILCSA"), P.L. 105-143, 111 Stat. 2658, was enacted by Congress on December 15, 1997, to implement judgments of the Indian Claims Commission in cases in which the Bay Mills Indian Community was a claimant, to allocate the awarded funds among the modern day eligible beneficiaries, and to create plans for the uses and distribution of tribal share of funds. A copy of the statute is attached as Exhibit A.

12. The Bay Mills plan for use and distribution of its share of the judgment funds awarded is contained in § 107 of MILCSA. A nonexpendable trust known as the "Land Trust" is established by § 107(a), funded with 20 per cent of the Tribe's funds, and

which authorizes only the earnings of the Land Trust to be used by the Tribe.

13. According to the provisions of § 107(a)(3) of MILSCA [sic], the earnings of the Land Trust "shall be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange." Any land obtained by the Tribe with Land Trust funds "shall be held as Indian lands are held".

14. In August 2010, the Tribe purchased approximately 27 acres in Corwith Township, (commonly known as "Vanderbilt Parcel") of Otsego County, Michigan, utilizing Land Trust earnings. A copy of the warranty deed memorializing the purchase and including the legal description of the property so acquired is attached as Exhibit B.

15. The Vanderbilt Parcel is subject to the civil and criminal laws of the Bay Mills Indian Community upon its acquisition by the Tribe utilizing the Land Trust funds, pursuant to Article II of the Tribe's Constitution and MILCSA.

16. Gaming is an activity regulated by the laws of the Bay Mills Indian Community. The Tribe regulates Class III gaming through its Gaming Ordinance ("Ordinance") which was duly approved by the National Indian Gaming Commission on August 31, 1993 in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701, 2710(d)(1).

17. Section 5.5 of the Ordinance limits gaming to "Indian lands" as defined in §2.30 of the Ordinance.

18. The Vanderbilt Parcel is "Indian lands" as defined in the Ordinance.

19. In addition Tribal regulation, Class III gaming on the Vanderbilt Parcel is also subject to federal oversight through the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701, 2710(d)(1).

20. IGRA limits the conduct of gaming by an Indian tribe to "Indian lands", which are defined in 25 U.S.C. §2703(4).

21. The Vanderbilt Parcel is "Indian lands" as defined in IGRA at 25 U.S.C. §2703(4)(B).

22. IGRA requires Class III gaming to be conducted by an Indian tribe pursuant to a compact with the State, 25 U.S.C. §2710(d)(3), the terms of which are approved by the Secretary of the Interior, 25 U.S.C. §2710(d)(8).

23. The Bay Mills Indian Community entered into a Class III Gaming Compact with the State of Michigan ("Compact"), on August 20, 1993, which was approved by the Secretary of the Interior, evidenced by notice published in the *Federal Register* on November 30, 1993. A copy of the Compact and its approval are attached as Exhibit C.

24. Section 4(H) of the Compact recognizes the right of the Tribe to conduct gaming on its "Indian lands".

25. The Vanderbilt Parcel is "Indian lands" as defined in the Compact in §2(B).

26. On November 3, 2010, the Bay Mills Indian Community opened a Class III gaming facility on the Vanderbilt Parcel.

GRAVAMEN OF CONTROVERSY

27. Governor Snyder's representatives, acting on behalf of the State of Michigan, have indicated by letter dated 12/16/2010 that they disagree that the Vanderbilt Parcel falls within the jurisdiction of the Bay Mills Indian Community. A copy of the letter is attached as Exhibit D.

28. Governor Snyder's representatives, acting on behalf of the State of Michigan, also indicated that they disagree that the Vanderbilt Parcel is "Indian land" as defined by the Compact. Ex. D.

29. Governor Snyder's representatives, acting on behalf of the State of Michigan, also indicated that they disagree that the Vanderbilt Parcel is eligible to be utilized by Bay Mills for Class III gaming. Ex. D.

30. Governor Snyder's representatives, acting on behalf of the State of Michigan, have asserted that Bay Mills activities are in violation of various State civil and criminal laws including MCL §750.301 *et*

seq. and have threatened to take "appropriate action to ensure compliance with its laws" reserving the right to charge additional State law violations not yet named. Ex. D.

31. Governor Snyder's representatives, acting on behalf of the State of Michigan, have demanded that Bay Mills cease its efforts to engage in Class III gaming on the Vanderbilt Parcel. Ex. D.

32. Governor Snyder's representatives, acting on behalf of the State of Michigan, continue to assert the application of State civil and criminal laws as to the Vanderbilt Parcel, threatening to charge officials, agents and employees of Bay Mills and otherwise seek to enforce State laws in Bay Mills territory.

33. These continued assertions of State jurisdiction over the Vanderbilt Parcel and of the actions of the Bay Mills Indian Community, its agents and officials thereon by Governor Snyder's representatives violate the supreme law of the land, Article VI, Clause 2, of the United States Constitution, MILCSA, and fundamental provisions of federal Indian law.

34. Without the protection of this Court, Governor Snyder and his representatives may, as they have already indicated, subject Bay Mills officials, agents and employees to criminal prosecution, civil fines and forfeiture or other sanctions in contravention of the laws of the United States.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter its judgment and declare that the Governor of the State of Michigan and his representatives lack authority over the Vanderbilt Parcel and that the laws of the Bay Mills Indian Community apply thereon, subject only to the laws of the United States.

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S.
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No. 12-515

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REPLY ARGUMENT 2

I. There is no other forum through which the State can vindicate its opposition to Bay Mills' illegal, off-reservation casino. 2

II. Bay Mills does not contest that there is a mature circuit split regarding the first question, i.e., whether federal subject-matter jurisdiction exists under 28 U.S.C. § 1331 to adjudicate an IGRA violation. 6

III. Bay Mills concedes that there is also a circuit split regarding the second question presented, i.e., the scope of IGRA's abrogation of tribal sovereign immunity. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Bay Mills Indian Community v. *Rick Snyder*,
Case No. 1:11-cv-729 (W.D.Mich.) 4

Ex Parte Young,
209 U.S. 123 (1908) 1, 3

F. Hoffmann-La Roche Ltd. v. *Empagran S.A.*,
542 U.S. 155 (2004) 5

Florida v. *Seminole Tribe of Florida*,
181 F.3d 1237 (11th Cir. 1999) 8

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. *Patchak*,
132 S. Ct. 2199 (2012) 5

Mescalero Apache Tribe v. *New Mexico*,
131 F.3d 1379 (10th Cir. 1997) 7

Morgan Stanley Capital Group Inc. v. *Public Util. Dist. No. 1*,
554 U.S. 527 (2008) 5

Shinseki v. *Sanders*,
556 U.S. 396 (2009) 5

United States v. *Tohono O'Odham Nation*,
131 S. Ct. 1723 (2011) 5

Wisconsin v. *Ho-Chunk Nation*,
512 F.3d 921 (7th Cir. 2008) 7

Statutes

25 U.S.C. § 2701 *et seq.* ..... passim
25 U.S.C. § 2710(d)(3)(C) 7
25 U.S.C. §2710(d)(3)(C)(vii) 7
28 U.S.C. § 1331 ..... 1, 6
28 U.S.C. § 1500 5
28 U.S.C. § 2409a 5

INTRODUCTION

The State of Michigan seeks review of a Sixth Circuit decision that presents a pair of recurring and widening circuit splits regarding how states and tribes can assert federal claims related to tribal gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA). Bay Mills says that certiorari is not warranted because the issues presented will be resolved through other claims still pending between the parties and because the asserted circuit splits do not actually exist. Bay Mills is wrong on both counts.

Bay Mills' main objection is that this Court should not review the substantial and unsettled questions presented because the State will be able to vindicate its interests through either the *Ex Parte Young* action filed by the State against individual tribal members, or through Bay Mills' *largesse* in filing a lawsuit against the State. Br. in Opp. 1–2, 24–27. But as explained in detail below, Bay Mills' arguments in both of those actions contradict its representations here.

Bay Mills also says there are no circuit conflicts. Not so. The first issue is whether a federal court has *subject-matter jurisdiction* to enjoin actions that violate IGRA but take place outside of Indian lands. Pet. i. The Sixth Circuit said no, but the Ninth and Tenth Circuits would say yes under 28 U.S.C. § 1331. Pet. 7–12. Bay Mills erects and then knocks down the classic straw man, arguing that 28 U.S.C. § 1331 does not abrogate *tribal sovereign immunity*. Br. in Opp. 22–23. But that is not the State's argument. Bay Mills' silence regarding the issue the State actually presents is thus an admission that a circuit split does exist.

The second issue presented is whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands. Pet. i. Here, the Sixth Circuit acknowledged that it was furthering a circuit split with the Tenth Circuit, App. 13a, a split that Bay Mills scorns because, according to Bay Mills, the Tenth Circuit decision "is poorly reasoned." Pet. 22. That characterization does not dispel the circuit conflict. And it fails to recognize that the split is even deeper than the Sixth Circuit appreciated, Pet. 13–15.

In sum, rhetoric cannot hide the fact that Bay Mills implicitly concedes a circuit split with respect to the first question, and expressly acknowledges a split regarding the second. And Bay Mills' assertion that there are alternative forums to resolve these disputed issues cannot be reconciled with Bay Mills' representations in those other forums. Certiorari is warranted.

REPLY ARGUMENT

I. There is no other forum through which the State can vindicate its opposition to Bay Mills' illegal, off-reservation casino.

Chief among Bay Mills' arguments for denying certiorari is that this dispute "continues against the Tribe's officials and its Gaming Commission in the district court and also is the subject of a separate declaratory judgment action brought by the Tribe." Br. in Opp. 1–2. What Bay Mills fails to say is that it is simultaneously disclaiming the State's right to relief in those very proceedings.

As noted in the Petition, federal courts have only inconsistently allowed *Ex Parte Young*-type claims where a plaintiff has alleged IGRA violations. Pet. Br. 16. Bay Mills chooses not to discuss this looming roadblock even though it has filed its own motion to dismiss the State's *Ex Parte Young*-type claims against the tribal officials in the underlying action. In that motion, Bay Mills argues that the State's claims against its officials must be dismissed because:

- Bay Mills council members are covered by Bay Mills' sovereign immunity, as they are elected officials of Bay Mills. 10/23/12 Bay Mills Br. in Support of Mot. to Dismiss 16–17.

- The State's *Ex Parte Young* claims do not overcome Bay Mills' special sovereignty interests in exercising governmental power over its land. *Id.* at 17–20.

- *Ex Parte Young*-type claims do not apply to IGRA-violation claims. *Id.* at 20–22.

- And Bay Mills is a required party that cannot be joined because it is immune from suit, and any judgment rendered in the Tribe's absence would be prejudicial and inadequate. *Id.* at 22–28.

Bay Mills' arguments contradict its representation here that the State can vindicate fully its interests through an *Ex Parte Young*-type action. Br. in Opp. 1–2, 24–27. And such arguments do not lessen the political tension of forcing one sovereign to sue another's officials. Pet. 17 (noting the tumult if Michigan sued Prime Minister David Cameron to circumvent the United Kingdom's sovereign immunity).

Similarly, Bay Mills contends that all of the issues raised in this suit can be resolved in the case the Tribe brought against Michigan Governor Rick Snyder, *Bay Mills Indian Community* v. *Rick Snyder*, Case No. 1:11-cv-729 (W.D.Mich.). There, Bay Mills is seeking declaratory relief against Governor Snyder on many of the same issues raised by the State related to its Vanderbilt casino. But Bay Mills is wrong to say that its "sovereign immunity is [ ] no longer a jurisdictional barrier prohibiting the adjudication of tribal governmental authority and jurisdiction." Br. in Opp. 25. That is because Bay Mills has not waived its immunity with regard to any counterclaim the State might bring in that action, such as a claim to enjoin Bay Mills from gaming outside of Indian lands. If the State seeks to bring such a claim, Bay Mills will undoubtedly respond with the Sixth Circuit's subject-matter-jurisdiction and sovereign-immunity rulings in this case.

And while Bay Mills implies that it would voluntarily comply with an adverse ruling in the case against Governor Snyder, Br. in Opp. 25, the State would have no ability to compel compliance with that result in federal court given the Sixth Circuit's ruling. If the Sixth Circuit is correct, the district court in the *Snyder* case lacks jurisdiction to enjoin Bay Mills from conducting gaming on non-Indian lands regardless of the Tribe's waiver of immunity. So *Snyder* is of no practical value to the State. Even if Bay Mills decided to re-open the Vanderbilt casino in the face of a district court ruling that the lands are not Indian lands, the Sixth Circuit has already barred the State from obtaining any remedy in federal court. The instant case is the best vehicle for resolving the disputed questions.

Incidentally, although this Court generally does not review cases in an interlocutory posture, it does review such cases when, as here, a court of appeals has finally decided an important legal issue that otherwise warrants examination by the Court. See, e.g., *Shinseki* v. *Sanders*, 556 U.S. 396 (2009); *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527 (2008); *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004).

In particular, the Court often reviews jurisdictional rulings, even when they come before the Court in an interlocutory posture. Only two Terms ago, for example, the Court granted the petition in *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), to review the Federal Circuit's reversal of a dismissal for lack of jurisdiction under 28 U.S.C. § 1500.

And just last Term, the Court granted the petition in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012), to review the D.C. Circuit's conclusion that federal courts had jurisdiction notwithstanding the Quiet Title Act, 28 U.S.C. § 2409a, to review the federal government's decision to take land in trust for a Tribe seeking to construct a casino.

The issues in this case similarly warrant review. As noted in the Petition, the questions of federal jurisdiction and tribal sovereign immunity under IGRA extend far beyond the case of illegal, off-reservation casinos. The recurring issues this case presents warrant this Court's immediate intervention and resolution.

II. Bay Mills does not contest that there is a mature circuit split regarding the first question, i.e., whether federal subject-matter jurisdiction exists under 28 U.S.C. § 1331 to adjudicate an IGRA violation.

In the Petition, the State explained at length why § 1331 vests the federal courts with jurisdiction to resolve an alleged IGRA violation, and how the Sixth Circuit's opposite conclusion conflicts with the Ninth and Tenth Circuits. Pet. 7–12. Bay Mills ignores the question actually presented and raises a new one instead: "the effect of federal question jurisdiction under 28 U.S.C. § 1331 on *tribal sovereign immunity*." Br. in Opp. 22–23 (emphasis added). Bay Mills then accuses the State of "wrongly conflat[ing] the possibility of subject matter jurisdiction under 28 U.S.C. § 1331 with an automatic abrogation of tribal sovereign immunity." Br. in Opp. 22. And Bay Mills says that there simply is no appellate-court decision "which holds that federal-question jurisdiction under § 1331 by itself negates an Indian tribe's immunity from suit." Br. in Opp. 23.

But the State has never argued that § 1331 abrogates tribal sovereign immunity. The question whether IGRA abrogates Tribal sovereign immunity in this context (the second question presented) is a very different issue from whether the federal courts have subject-matter jurisdiction to hear IGRA disputes. In other words, Bay Mills has created a straw-man argument so that it can avoid discussing the § 1331 question altogether. That fact is telling and amounts to a concession that the circuits are indeed divided on the first question presented.

Finally, Bay Mills failed to respond at all to Michigan's argument that "the Sixth Circuit should have recognized federal-court jurisdiction" because illegal class III gaming activities "*did* occur on Indian lands, such as the Tribe's licensing of the off-reservation casino and the Tribe's ongoing supervision [from Indian lands] of the casino's operations." Pet. 12.

III. Bay Mills concedes that there is also a circuit split regarding the second question presented, i.e., the scope of IGRA's abrogation of tribal sovereign immunity.

Bay Mills concedes that the opinion below conflicts with the Tenth Circuit's decision in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997). Br. in Opp. 21. Bay Mills also acknowledges that the Eleventh Circuit rejected *Mescalero*. Br. in Opp. 21. Nonetheless, Bay Mills argues the Court should ignore the circuit conflict because, in Bay Mills' view, *Mescalero* is unpersuasive. That argument does not diminish the circuit conflict. It also fails to account for the other conflicting circuit cases in this area.

As explained in the Petition, Pet. 14, the Seventh Circuit in *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008), interpreted IGRA as abrogating tribal sovereign immunity with respect to *any* claim alleging a violation of a gaming compact arising from the subjects of compact negotiation in § 2710(d)(3)(C). That list includes "any [ ] subjects that are directly related to the operation of gaming activities," 25 U.S.C. §2710(d)(3)(C)(vii), such as the allowed venues for a gaming operation. Bay Mills does not disagree. Br. in Opp. 17–18.

Similarly, the Eleventh Circuit in *Florida* v. *Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999), held that "Congress [in IGRA] abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact." *Id.* at 1242. That circumstance is precisely what the State alleges here.

Bay Mills describes the Eleventh Circuit's holding as rejecting a "broad reading" of IGRA's abrogation of tribal sovereign immunity. Br. in Opp. 14–15. But Bay Mills fails to explain why the State's action here—suing a tribe for conducting gaming in violation of an existing compact—fails to fall within the plain scope of the Eleventh Circuit's rule.

And as with jurisdiction, Bay Mills failed to respond to Michigan's argument that Bay Mills' illegal class III gaming activities (such as licensing and ongoing supervision of casino operations) "undeniably took place on Indian lands—the Bay Mills reservation itself." Pet. 15. "Thus, even were the Court to adopt the Sixth Circuit's approach [to abrogation of tribal sovereign immunity] . . ., the Sixth Circuit should be reversed, and the district court's grant of an injunction against Bay Mills should be sustained." *Ibid.*

* * *

Bay Mills response says nothing to dispel the actuality that the Petition presents two questions of substantial jurisprudential and practical significance, both involving mature conflicts among the circuits. Nor does the response explain why a state has plenary power to enjoin a tribe's illegal casino located *on* a reservation, but no power to enjoin the same illegal

casino when located *off* reservation, i.e., on Michigan's own sovereign lands. The recurring nature of the questions presented—as well as the importance of providing clear guidance to lower courts and the states regarding the proper sovereignty boundaries when litigating class III gaming disputes—counsels strongly in favor of granting the petition.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction over a State's claim brought under 25 U.S.C. 2710(d)(7)(A)(ii) seeking to enjoin gaming by an Indian tribe, where the State alleges that the gaming is not located on "Indian lands" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. 2703(4).

2. Whether 25 U.S.C. 2710(d)(7)(A)(ii) abrogates an Indian tribe's sovereign immunity with respect to a State's claim that the tribe is gaming illegally, where the State alleges that the gaming is not located on Indian lands.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 12
I. The court of appeals correcly held that Counts I-III must be dismissed 12
II. The court of appeals properly analyzed the applicable law governing Tribal sovereign immunity 17
III. This case is an inappropriate vehicle to resolve the parties' dispute 20
Conclusion 23

TABLE OF AUTHORITIES

Cases:

C & L Enters., Inc. v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) 18
Cabazon Band of Mission Indians v. *Wilson*, 124 F.3d 1050 (1997), cert. denied, 524 U.S. 926 (1998) 15
Florida v. *Seminole Tribe*, 181 F.3d 1237 (11th Cir. 1999) 18, 19
Free Enter. Fund v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 14
Grable & Sons Metal Prods., Inc. v. *Darue Eng'g*, 545 U.S. 308 (2005) 11
Hamilton-Brown Shoe Co. v. *Wolf Bros.*, 240 U.S. 251 (1916) 21
Kiowa Tribe v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998) 18
Lewis v. *Norton*, 424 F.3d 959 (2005) 19
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. *Patchak*, 132 S. Ct. 2199 (2012) 4
Mescalero Apache Tribe v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997) 9, 16, 18, 19

Cases—Continued: Page

Pueblo of Santa Ana v. *Kelly*, 104 F.3d 1546 (10th Cir.), cert. denied, 522 U.S. 807 (1997) 16
Rowe v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) 22
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 21
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 21
Wisconsin v. *Ho-Chunk Nation*, 512 F.3d 921 (7th Cir.), cert. dismissed, 129 S. Ct. 28 (2008) 19
Young, Ex parte, 209 U.S. 123 (1908) 22

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 702 ..... 2, 3
Bay Mills Indian Community Mich., Ordinance to Regulate the Operation of Gaming by the Bay Mills Indian Community, (Aug. 31, 1993), http://www.nigc.gov/Portals/0/NIGC %20Uploads/readingroom/gamingordinances/baymills/ordappr083193.pdf:
§ 4 4
§ 5.5(A) 5
Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*:
25 U.S.C. 2701-2721 1
25 U.S.C. 2702(1) 1
25 U.S.C. 2703(4) 2, 6, 20
25 U.S.C. 2703(4)(B) 6
25 U.S.C. 2703(6)-(8) 2
25 U.S.C. 2703(8) 2
25 U.S.C. 2710(b) 2
25 U.S.C. 2710(d)(1) 2

Statutes and regulations —Continued: Page

25 U.S.C. 2710(d)(2) 3
25 U.S.C. 2710(d)(3)(C) 20
25 U.S.C. 2710(d)(3)(C)(i)-(vii) 19
25 U.S.C. 2710(d)(7)(A)(ii) ..... *passim*
25 U.S.C. 2710(d)(8) 2
25 U.S.C. 2713 3
25 U.S.C. 2714 ..... 3, 22
25 U.S.C. 2719 ..... 6, 7, 10, 13
25 U.S.C. 2719(a) 2
25 U.S.C. 2719(a)(1) 2, 4
25 U.S.C. 2719(b)(1)(B) 4
25 U.S.C. 2719(b)(1)(B)(i) 2
Sarbanes-Oxley Act of 2002, 15 U.S.C. 7201 *et seq.* 14
15 U.S.C. 78y 14
15 U.S.C. 1172 4
18 U.S.C. 1166 4
18 U.S.C. 1955 4
25 U.S.C. 465 3
28 U.S.C. 1331 ..... 7, 8, 9, 11, 13, 17
28 U.S.C. 1362 ..... 8, 9, 13
Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, 111 Stat. 2652:
§ 104, 111 Stat. 2653 5
§ 107(a)(1), 111 Stat. 2658 5
§ 107(a)(3), 111 Stat. 2658 5
Michigan Compiled Law § 431.220 9

Regulations—Continued: Page

25 C.F.R.:
Pt. 292:
Section 292.3(b) 3
Section 292.4 3
Section 292.5 3
Pt. 502:
Section 502.4 2
Pt. 522:
Section 522.7 ..... 3, 22
Pt. 573:
Section 573.3 3
Section 573.5 3
Pt. 580: 3, 22
Section 580.10 ..... 3, 22

Miscellaneous:

Bay Mills Indian Community, Mich., Ordinance to Regulate the Operation of Gaming by the Bay Mills Indian Community (Aug. 31, 1993), http://www.nigc.gov/Portals/0/NIGC%20 Uploads/readingroom/gamingordinances/baymills/ordappr083193.pdf 4
58 Fed. Reg. 63,262 (1993) 4
73 Fed. Reg. (2008):
p. 29,354 6
p. 29,355 6
p. 29,357 6
77 Fed. Reg. (2012):
pp. 47,868-47869 4

In the Supreme Court of the United States

No. 12-515

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701-2721, to provide a statutory basis for the operation of gaming by Indian tribes. 25 U.S.C. 2702(1). Gaming authorized by IGRA may occur only on "Indian lands," which are defined as: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against aliena-

tion and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4).

IGRA prohibits gaming "on lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988" (the effective date of IGRA), unless the land falls within a listed exception. 25 U.S.C. 2719(a). Under one exception, gaming on such lands is permitted if "[the] lands are located within or contiguous to the boundaries of the [tribe's] reservation," or if the "lands are taken into trust as part of * * * a settlement of a land claim." 25 U.S.C. 2719(a)(1) and (b)(1)(B)(i).

IGRA divides gaming into three classes, each subject to different regulation. 25 U.S.C. 2703(6)-(8). Class III gaming, at issue here, includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming must be: (1) authorized by a tribal ordinance that satisfies the requirements of 25 U.S.C. 2710(b) and is approved by the Chairman of the National Indian Gaming Commission (NIGC or Commission); (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian tribe and the State that is approved by the Department of the Interior (Interior). 25 U.S.C. 2710(d)(1) and (8).

b. There are various administrative and judicial mechanisms for determining whether IGRA authorizes class III gaming by an Indian tribe.

The decision by Interior to approve a tribal-state compact is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 702. Once a tribal-state compact is approved, 25 U.S.C. 2710(d)(7)(A)(ii) provides that federal district courts "shall have jurisdic-

tion" over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact * * * that is in effect."

IGRA itself authorizes judicial review of the NIGC Chairman's decision to approve or disapprove a tribal gaming ordinance. 25 U.S.C. 2710(d)(2), 2714. If the Chairman disapproves the ordinance, the tribe may also appeal that decision to the full Commission. See 25 C.F.R. 522.7; 25 C.F.R. Pt. 580; 25 C.F.R. 580.10.

If an Indian tribe engages in class III gaming on Indian lands without the required approvals, the NIGC Chairman has the authority to issue a notice of violation, 25 C.F.R. 573.3, and assess civil penalties, 25 U.S.C. 2713. Those administrative actions are subject to judicial review. 25 U.S.C. 2714. The tribe may also appeal a notice of violation to the full Commission, 25 C.F.R. Part 580, and then seek judicial review of the Commission's decision. See 25 C.F.R. 573.5, 580.10.

If an Indian tribe desires to undertake class III gaming on land that does not fit the definition of Indian lands, the tribe can request Interior to take the land into trust pursuant to 25 U.S.C. 465 for purposes of gaming if the land satisfies the criteria under 25 C.F.R. 292.4 or 292.5. When a tribe makes such a request, Interior issues an Indian lands determination along with the final land-into-trust decision that provides the tribe with Interior's legal view of whether the land is within the definition of Indian lands and is eligible for gaming. 25 C.F.R. 292.3(b). The land-into-trust decision and underlying Indian lands determination are subject to judicial review under the APA. 5 U.S.C. 702; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S.Ct. 2199, 2209-2210 (2012).

Where an Indian tribe engages in gaming without complying with IGRA's requirements, the United States can enforce federal criminal laws and related civil enforcement provisions governing gaming. Relevant federal laws include 18 U.S.C. 1955 ("Prohibition of illegal gambling businesses"), 18 U.S.C. 1166 ("Gambling in Indian country"), and 15 U.S.C. 1172 ("[Interstate] [t]ransportation of gambling devices as unlawful"). States may also apply their laws to gaming outside of Indian country.

2. a. Respondent Bay Mills Indian Community is a federally recognized Indian tribe with a reservation located in Michigan's Upper Peninsula. 77 Fed. Reg. 47,868-47,869 (Aug. 10, 2012); Pet. App. 3a. On August 20, 1993, respondent entered into a tribal-state compact with petitioner State of Michigan pursuant to IGRA. 58 Fed. Reg. 63,262 (Nov. 30, 1993); Pet. App. 73a-96a. Shortly thereafter, the NIGC Chairman approved respondent's initial class III gaming ordinance. The ordinance provided for the establishment of a Tribal Gaming Commission as a political subdivision of respondent. Bay Mills Indian Community, Mich., Ordinance to Regulate the Operation of Gaming by the Bay Mills Indian Community (1993 Ordinance), § 4 (Aug. 31, 1993), http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/baymills/ordappr083193.pdf. Tracking the language of IGRA, 25 U.S.C. 2719(a)(1) and (b)(1)(B), Section 5.5(A) of the ordinance provided that "[t]he proposed gaming activity is to be located on land which was held in trust for [respondent] prior to October 17, 1988," "on trust lands which were located within or contiguous to the boundaries of the Reservation on October 17, 1988," or "on lands taken into trust after October 17, 1988 as a settlement of a claim." 1993 Ordi-

nance, § 5.5(A). Pursuant to the ordinance, respondent operates class III gaming facilities on its reservation. Pet. App. 4a.

b. In 1997, Congress passed the Michigan Indian Land Claims Settlement Act (MILCSA or Act) to provide for the division, use, and distribution of judgment funds of the Ottawa and Chippewa Indians of Michigan awarded by the Indian Claims Commission. Pub. L. No. 105-143, 111 Stat. 2652. Judgment funds were distributed under MILCSA to respondent and four other Indian tribes. § 104, 111 Stat. 2653.

MILCSA directed respondent's Executive Council to establish a "Land Trust" and to deposit 20% of respondent's funds into the Land Trust. § 107(a)(1), 111 Stat. 2658. The earnings generated by the Land Trust are to be used "exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange." § 107(a)(3), 111 Stat. 2658. The Act directs that lands acquired pursuant to this provision "shall be held as Indian lands are held." *Ibid.*

c. Respondent became interested in using earnings from its Land Trust to purchase land for a gaming facility in the Village of Vanderbilt, Michigan (Vanderbilt Parcel), approximately 125 miles from respondent's reservation. Pet. App. 22a. On May 26, 2010, respondent submitted to the NIGC an amendment to its 1993 gaming ordinance that revised Section 5.5(A) to include a site-specific description of the Vanderbilt Parcel. 1:10-cv-1273 Docket entry No. (Docket entry No.) 4, Exh. 8 (W.D. Mich. Dec. 23, 2010). Respondent's submission informed the NIGC of its position that because the Vanderbilt Parcel would be purchased with funds from its Land Trust, it would qualify as "restricted fee"

lands and on that basis would be Indian lands eligible for gaming under IGRA. *Id.* at 28-52; see 25 U.S.C. 2703(4).[1]

Respondent subsequently withdrew that amendment and submitted another one. The new amendment revised Section 5.5(A) as follows: "The Tribal [Gaming] Commission shall automatically issue the above license to any tribally-owned or tribally-operated Class II or Class III proposed gaming enterprise if: (A) The proposed gaming activity is to be located on 'Indian lands', as defined in Section 2.30 of this Ordinance, and is not prohibited by [25 U.S.C. 2719]." Pet. App. 140a. Tracking the language of IGRA, 25 U.S.C. 2703(4), respondent's revised Section 2.30 defines "Indian lands" as: "(A) All lands within the limits of the Reservation of [respondent]; and (B) Any lands title to which is either held in trust by the United States for the benefit of [respondent] or held by [respondent] subject to restriction by the United States against alienation and over which [respondent] exercises governmental power." Pet. App. 111a.

In August 2010, respondent purchased the Vanderbilt Parcel. Pet. App. 4a. On September 15, 2010, the NIGC

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[1] 25 U.S.C. 2703(4)(B) defines nonreservation Indian lands as lands held in trust by the United States *or* lands "held by any Indian tribe * * * subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." Interior and NIGC interpret the prohibition in Section 2719 against gaming on Indian lands acquired "in trust" by the Secretary after October 17, 1988, to apply only to trust, not restricted fee, Indian lands. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,355, 29,357 (May 20, 2008). Accordingly, if lands purchased with funds from respondent's Land Trust are restricted fee Indian lands, IGRA would not prohibit gaming on those lands.

Chairwoman approved the revised amendment to respondent's gaming ordinance. Respondent established a small gaming facility on the property and commenced operations on November 3, 2010. *Ibid.*

3. a. On December 21, 2010, petitioner filed a complaint for declaratory and injunctive relief in federal court to prevent respondent from operating a class III gaming facility on the Vanderbilt Parcel. Pet. App. 4a, 19a-20a. Counts I and II asserted that the Vanderbilt Parcel did not constitute "Indian lands" as defined by IGRA; that respondent had therefore violated Section 4(H) of the tribal-state compact, which provides that "[t]he Tribe shall not conduct any Class III gaming outside of Indian lands"; and that respondent violated Section 4(C) of the tribal-state compact, which provides that "[a]ny violation of this Compact, tribal law, IGRA, or other applicable federal law shall be corrected immediately by the Tribe." *Id.* at 6a-7a, 9a-10a, 81a. Count III alleged in the alternative that even if the Vanderbilt Parcel constituted Indian lands, respondent violated 25 U.S.C. 2719 (and therefore the compact's requirement that gaming must comply with federal law) by operating a gaming facility on land acquired after October 17, 1988, that does not satisfy any of that provision's listed exceptions. Pet. App. 10a. Petitioner alleged federal jurisdiction over its claims under 25 U.S.C. 2710(d)(7)(A)(ii) and 28 U.S.C. 1331. Docket entry No. 1, paras. 1(a), 26, 38, 46.

b. On the same day petitioner filed its complaint, the Solicitor of Interior and the NIGC Office of General Counsel issued legal opinions providing their views on the status of the land. Pet. 5. The Solicitor of Interior concluded that the Vanderbilt Parcel is not restricted fee or trust land eligible for gaming. Docket entry

No. 7, Exh. 1. The NIGC Office of General Counsel deferred to that legal opinion and concluded that because the Vanderbilt Parcel is not Indian lands, NIGC has no jurisdiction over it. *Id.*, Exh. 2.

c. The next day, the Little Traverse Bay Bands of Odawa Indians (Little Traverse), which operates a casino approximately 40 miles from the Vanderbilt Parcel, filed a nearly identical complaint that alleged as an additional basis for jurisdiction 28 U.S.C. 1362, which confers jurisdiction over an action brought by an Indian tribe arising under federal law. See 1:10-cv-1278 Docket entry No. 1, paras. 15-19, 21-24, 26-29. The cases were consolidated. Pet. App. 20a.

4. Little Traverse filed a motion for a preliminary injunction and petitioner filed a brief in support of that motion. Pet. App. 5a, 20a. The district court entered a preliminary injunction. *Id.* at 19a-39a.

a. Respondent argued that the court lacked jurisdiction under Section 2710(d)(7)(A)(ii), which provides jurisdiction to "enjoin a class III gaming activity *located on Indian land* and conducted in violation of any Tribal-State compact," because Little Traverse's complaint alleged that the Vanderbilt Parcel was *not* Indian lands. Pet. App. 24a-25a. The court did not address that issue, but concluded that it had jurisdiction under 28 U.S.C. 1331 and 1362 because "the complaint * * * requires [the court] to interpret MILCSA § 107(a)(3), obviously a federal law." Pet. App. 25a.

b. The court further concluded that Little Traverse was likely to succeed on the merits because MILCSA did not authorize respondent to purchase the Vanderbilt Parcel. Pet. App. 27a-34a. The court reasoned that MILCSA requires any land purchased with Land Trust earnings to be "*both* a consolidation *and* an enhance-

ment," and therefore authorizes respondent to purchase only "land next to, or at least near, its existing tribal landholdings." *Id.* at 31a-32a. The court further concluded that Little Traverse would suffer irreparable competitive harm and that an injunction was in the public interest. *Id.* at 34a-38a.

c. Respondent appealed and moved for a stay of the injunction, which the district court denied. Resp. App. 1-11. In its stay motion, respondent argued that sovereign immunity barred the suits. The district court acknowledged that neither 28 U.S.C. 1331 nor 1362 clearly abrogated respondent's sovereign immunity. But it concluded that respondent's sovereign immunity was abrogated by 25 U.S.C. 2710(d)(7)(a)(ii), noting that a "majority of courts to consider the issue have found that the 'IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions [is] at issue and where only declaratory or injunctive relief is sought.'" Resp. App. 6 (quoting *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997)).

d. On August 9, 2011, while respondent's appeal of the preliminary injunction was pending, petitioner amended its complaint to add three additional claims and to name as additional defendants respondent's Tribal Gaming Commission and the Commission's members in their official capacities, and members of respondent's Executive Council in their official capacities. Pet. App. 55a-72a. Count IV alleged that the defendants violated federal common law by permitting and operating a casino that exceeds the scope of their authority. *Id.* at 67a-69a. Count V alleged a violation of Michigan Compiled Laws § 432.220 (failure to obtain a state license for the gaming facility) and sought forfeiture of respondent's

gaming machines and the gross receipts from its gaming operation. Pet. App. 69a-70a. Count VI alleged that operation of the Vanderbilt casino was a public nuisance under state law. *Id.* at 70a-71a.

5. a. The court of appeals vacated the preliminary injunction. Pet. App. 1a-18a. The court concluded that Section 2710(d)(7)(A)(ii) did not provide a basis for jurisdiction over Counts I-III. The court explained that Section 2710(d)(7)(A)(ii) provides federal jurisdiction only where all of the following conditions are satisfied:

> (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.

Id. at 7a. The court concluded that the third condition was not satisfied because the complaints alleged that the Vanderbilt Parcel is *not* Indian lands. *Id.* at 7a-8a. The court also rejected the alternative claim in Count III that even if the Vanderbilt Parcel is Indian lands, gaming is prohibited by 25 U.S.C. 2719. The court explained that Section 2719 applies only to land "acquired by the Secretary in trust" after October 17, 1988, but the complaints alleged that the Vanderbilt Parcel was acquired by respondent itself. Pet. App. 10a. The court concluded that this analysis "knock[ed] out all of Little Traverse's causes of action." *Ibid.*

b. The court next held that the district court had jurisdiction over the federal common law and state law claims against respondent alleged in Counts IV-VI of

petitioner's amended complaint. Pet. App. 10a-11a.[2] Citing *Grable & Sons Metal Products, Inc.* v. *Darue Engineering*, 545 U.S. 308, 312 (2005), the court concluded that the district court had jurisdiction over those claims under 28 U.S.C. 1331. Pet. App. 11a.

The court further held, however, that the claims were barred by respondent's sovereign immunity. Pet. App. 11a-18a. The court explained that "for the same reasons that [Section] 2710(d)(7)(A)(ii) does not supply federal jurisdiction in this case," *i.e.*, because the complaints alleged that the Vanderbilt Parcel is not Indian lands, "it does not abrogate [respondent's] immunity." *Id.* at 13a.

The court of appeals remanded for the district court to address petitioner's claims against the additional defendants named in the amended complaint. Pet. App. 17a-18a. On remand, Little Traverse informed the district court that it would voluntarily seek dismissal of its action, and the court dismissed its complaint with prejudice. Br. in Opp. 6.

6. On July 15, 2011, while the appeal was pending, respondent brought an action for declaratory relief against the Governor of Michigan, seeking to adjudicate whether the Vanderbilt Parcel constitutes "Indian lands" under IGRA. Resp. App. 12-19. The case was assigned to the same district court judge who is presiding over petitioner's complaint. The Governor filed an answer to respondent's complaint asserting Eleventh

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[2] Respondent moved to strike the portions of petitioner's and Little Traverse's briefs that addressed claims that were not included in the complaints underlying the preliminary injunction. No. 11-1413, Document No. 006111102104 (6th Cir. Oct. 18, 2011). Without ruling on the motion, the court of appeals addressed Counts IV-VI alleged in petitioner's amended complaint. Pet. App. 10a-18a.

Amendment immunity as a defense. No. 1:11-cv-00729-PLM Docket entry No. 7, at 6 (W.D. Mich. Sept. 30, 2011).

DISCUSSION

The court of appeals correctly concluded that IGRA claims brought under 25 U.S.C. 2710(d)(7)(A)(ii) must be dismissed where the State alleges that the gaming is not on "Indian lands." Furthermore, although the court of appeals addressed tribal sovereign immunity in the context of claims that did not form the basis for the preliminary injunction, the court correctly concluded that Section 2710(d)(7)(A)(ii) does not abrogate respondent's sovereign immunity for claims alleging that gaming is not on Indian lands. The court's decision does not present any issue warranting review, and this case is not an appropriate vehicle for resolving the parties' underlying dispute. Certiorari should be denied.

I. THE COURT OF APPEALS CORRECLY HELD THAT COUNTS I-III MUST BE DISMISSED

A. 25 U.S.C. 2710(d)(7)(A)(ii) provides that federal district courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact * * * that is in effect." The court of appeals correctly concluded that Counts I-III of petitioner's complaint must be dismissed.

As the court of appeals recognized, the requirements of Section 2710(d)(7)(A)(ii) are not satisfied with respect to Counts I and II because those counts allege that the Vanderbilt Parcel is *not* Indian lands. Pet. App. 7a-9a. The court also correctly rejected petitioner's alternative claim in Count III that even if the Vanderbilt Parcel

were Indian lands, gaming on that parcel is prohibited by 25 U.S.C. 2719. As the court of appeals explained, Section 2719 prohibits gaming (with listed exceptions) on land "acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," but the complaint alleges that the Vanderbilt Parcel was acquired by respondent itself, not by the Secretary, and the land is not in trust. Pet. App. 10a.

B. Petitioner contends (Pet. 7-12) that although the requirements of Section 2710(d)(7)(A)(ii) are not satisfied with respect to Counts I-III, the court of appeals should have concluded that the district court had jurisdiction over those claims under 28 U.S.C. 1331. Although the court of appeals determined that the defects in petitioner's Section 2710(d)(7)(A)(ii) claims were jurisdictional, the court of appeals appears to have interpreted that provision as providing both a cause of action and federal jurisdiction over that cause of action. Pet. App. 7a (plaintiffs' claims "arise under 25 U.S.C. § 2710(d)(7)(A)(ii)"). The decision is therefore best viewed as also holding that petitioner necessarily failed to state a claim under Section 2710(d)(7)(A)(ii) because the elements of such a claim were not properly alleged. Thus, the claims were properly dismissed irrespective of whether jurisdiction over those claims could be based on 28 U.S.C. 1331 or 1362.

Indeed, for Counts IV-VI in petitioner's amended complaint, which were not brought under Section 2710(d)(A)(7)(ii), the court evaluated whether there was jurisdiction under 28 U.S.C. 1331 and concluded that there was. Pet. App. 10a-11a. The court's conclusion that Section 2710(d)(7)(A)(ii) did not provide jurisdiction over Counts I-III was thus based on the specific pleading requirements of a claim brought under that provi-

sion, and the court correctly held that Section 2710(d)(7)(A)(ii) does not provide an avenue for the State to challenge gaming on the Vanderbilt Parcel.[3]

C. Petitioner contends (Pet. 9) that the court of appeals' decision conflicts with this Court's decision in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010). That is incorrect. In *Free Enterprise Fund*, the Court held that the grant of jurisdiction to the courts of appeals in 15 U.S.C. 78y for challenges to final orders or rules of the Securities and Exchange Commission was not the exclusive means for challenging the constitutionality of the Public Company Accounting Oversight Board (Board) created by the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7201 *et seq.* 130 S. Ct. at 3150. The Court explained that the plaintiffs' "general challenge to the Board [was] 'collateral' to any Commission orders or rules from which review might be sought" under 15 U.S.C. 78y, and that Congress did not intend to require a plaintiff challenging the constitutionality of the Board to incur sanctions before bringing its challenge. *Ibid.* Here, in contrast, petitioner's claims that respondent is gaming on the Vanderbilt Parcel in violation of IGRA and the tribal-state compact are not collateral to the cause of action provided in Section 2710(d)(7)(A)(ii). Section 2710(d) describes the legal requirements for class III gaming under IGRA, and subsection 2710(d)(7)(A)(ii) gives the district courts jurisdiction over specific causes of action related to such gaming.

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[4] Petitioner contends (Pet. 8) that the complaint also raises the question "whether lands purchased with [MILCSA funds] constitute 'Indian lands.'" Petitioner's complaint, however, does not plead any cause of action provided by MILCSA.

D. Petitioner further contends (Pet. 10-11) that the court of appeals' decision conflicts with decisions of the Ninth and Tenth Circuits that exercised jurisdiction over tribal-state compact disputes.

In *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (1997), cert. denied, 524 U.S. 926 (1998), the Ninth Circuit concluded that it had jurisdiction under Section 1331 over a dispute between four Indian tribes and the State of California arising from their tribal-state compacts. *Id.* at 1055-1056. The parties agreed as a term of their compacts to submit to a federal district court the issue whether the State could lawfully require payment of licensing fees related to the gaming operations. *Id.* at 1053-1054. After a federal court concluded that the fees were not authorized under IGRA, the tribes sued the State to recover the fees. *Id.* at 1054. The court of appeals rejected the State's argument that Section 2710(d)(7)(A) limits federal court jurisdiction over compact-related actions to the types of actions specified in that subsection. *Id.* at 1056. The court explained that Section 2710(d)(3)(C)(v) authorizes compacts to include "remedies for breach of contract" and thus "invites the tribe and the state to waive their respective immunities and consent to suit in federal court." *Ibid.* The court determined that the parties had done so in their compacts by agreeing that "[j]udicial review of any action taken by either party under this Compact, or seeking any interpretation of this Compact, shall be had solely in the appropriate [federal] District Court." *Id.* at 1057.

In contrast to the compacts in *Cabazon Band*, the compact between petitioner and respondent contains no provision agreeing to federal-court review of disputes arising under the compact. Instead, the compact sets

forth an arbitration procedure for breach-of-compact claims, states that the procedure does not limit "any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact," and declares that nothing in the Compact waives either party's sovereign immunity. Pet. App. 89a-90a.

In *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997), the Tribe sued the State of New Mexico under Section 2710(d)(7)(A)(i), for failure to engage in good-faith negotiations with the tribe to enter into a gaming compact. While the suit was pending, the Governor entered into a compact with the tribe. *Id.* at 1380. After the New Mexico Supreme Court held that the Governor lacked authority to enter into the compact, the State asserted a counterclaim against the tribe seeking a declaration that the Compact was invalid. *Id.* at 1380-1381. Citing its decision in *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir.), cert. denied, 522 U.S. 807 (1997) another case addressing the Governor's authority to enter into tribal gaming compacts in which the court stated that a federal court "ha[s] the power to determine whether a Tribal-State compact was valid," *id.* at 1557, the court concluded that it had jurisdiction over the State's counterclaim under Section 2710(d)(7)(A)(ii). *Mescalero*, 131 F.3d at 1380-1381, 1386.

Petitioner contends (Pet. 11-12) that under the court of appeals' holding in this case, there would be no federal jurisdiction over the counterclaim in *Mescalero* because the State alleged that the tribal-state compact was *not* in effect, which is a requirement of Section 2710(d)(7)(A)(ii). Although there is disagreement between *Mescalero* and the court of appeals' decision in

that sense, *Mescalero* arose in quite different circumstances—including a compact that had been entered into but was allegedly not authorized—and did not contain a detailed jurisdictional analysis. Any tension between the court of appeals' decision and *Mescalero* is not sufficient to justify this Court's review. See also pp. 18-19, *infra*.

II. THE COURT OF APPEALS PROPERLY ANALYZED THE APPLICABLE LAW GOVERNING TRIBAL SOVEREIGN IMMUNITY

A. After the court of appeals concluded that the district court lacked jurisdiction over petitioner's IGRA claims (Counts I-III), it further considered whether the district court had jurisdiction over the federal common law and state law claims in petitioner's amended complaint (Counts IV-VI), concluded that the district court had jurisdiction over those claims under 28 U.S.C. 1331, but further concluded that tribal sovereign immunity barred those claims as to respondent. Pet. App. 10a-17a. When petitioner amended its complaint to add Counts IV-VI, the district court had already entered the preliminary injunction and the appeal of that injunction was already pending. The district court should have been afforded the opportunity to address those claims in the first instance, including whether it had jurisdiction over the claims and whether the claims were barred against one or more defendants by tribal sovereign immunity. Those claims are not properly before this Court.[4]

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[4] For this reason, petitioner's contentions that the district court had jurisdiction over Counts I-III under Section 2710(d)(7)(A)(ii) because the amended complaint alleged that the Tribal Gaming Commission and members of respondent's Executive Council licensed and supervised casino operations on the Vanderbilt Parcel from its reservation, which indisputably constitutes Indian lands (Pet. 12),

B. 1. In any event, the court of appeals properly analyzed the law governing tribal sovereign immunity. An Indian tribe is subject to suit only when Congress has authorized the suit and thus abrogated the tribe's sovereign immunity, or when the tribe has waived its immunity. *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998). The congressional abrogation or tribal waiver must be clear. See, *e.g.*, *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). The court of appeals correctly concluded that "for the same reasons that [Section] 2710(d)(7)(A)(ii) does not supply federal jurisdiction in this case"—*i.e.*, because petitioner alleges that the Vanderbilt Parcel is *not* Indian lands—"it does not abrogate [respondent's] sovereign immunity." Pet. App. 13a; see *Florida* v. *Seminole Tribe*, 181 F.3d 1237, 1242 (11th Cir. 1999) (holding that IGRA abrogates tribal sovereign immunity only in the "narrow circumstance[s]" specified in the statute).

2. Petitioner contends (Pet. 13-14) that other courts of appeals have construed IGRA as providing a broader abrogation of tribal sovereign immunity than the court of appeals found here. The cases petitioner cites do not establish a conflict warranting this Court's review.

In *Mescalero*, the Tenth Circuit stated that "[w]hile there is sparse case law on the issue, it appears the majority supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." 131 F.3d at 1385. But as the court of appeals pointed

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and that respondent's sovereign immunity is abrogated because that authorization allegedly was conferred by respondent on its reservation (Pet. 15), are not properly before this Court.

out and petitioner conceded below, "*Mescalero* offers virtually no support" for its reading of Section 2710(d)(7)(A)(ii); and to the extent it did, the Tenth Circuit relied on cases addressing whether a tribe had *waived* its sovereign immunity by engaging in gaming under IGRA, not whether Congress *abrogated* tribal sovereign immunity by the terms of IGRA. Pet. App. 13a; see *Mescalero*, 131 F.3d at 1386; *Seminole Tribe*, 181 F.3d at 1242 ("[T]he cases that the [Tenth Circuit] cited * * * addressed an entirely different matter, to wit: whether a tribe voluntarily waives its own sovereign immunity by engaging in gaming under IGRA.").

In the more than 15 years since *Mescalero* was decided, no other court has adopted its broader view of the scope of IGRA's abrogation of tribal sovereign immunity. Petitioner contends (Pet. 13) that the Ninth Circuit adopted a similar view in *Lewis* v. *Norton*, 424 F.3d 959 (2005), but that is incorrect. In *Lewis*, the plaintiffs claimed that they were entitled to enrollment as tribal members, which would in turn entitle them to a share of the tribe's gaming revenue. *Id.* at 960. The court rejected the plaintiffs' argument that IGRA abrogated the tribe's sovereign immunity to tribal membership claims, stating that "IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue" and "do[es] not constitute a broad waiver of sovereign immunity covering an intra-tribal membership dispute whenever gaming revenues are at stake." *Id.* at 962-963. The former statement, written in general terms, did not constitute a holding that IGRA abrogates tribal sovereign immunity in circumstances, such as those here, that were not before the court.

In *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir.), cert. dismissed, 129 S. Ct. 28 (2008), the Sev-

enth Circuit concluded that IGRA abrogates tribal sovereign immunity only for tribal-state compact disputes that fall within the ambit of Section 2710(d)(3)(C)(i)-(vii), because the text of Section 2710(d)(7)(A)(ii) refers to causes of action for violations of a compact "entered into under Paragraph (3) [25 U.S.C. § 2710(d)(3)(C)]." 512 F.3d at 934-935. Because tribal-state revenue-sharing agreements do not expressly appear on the list of items that may be negotiated under Section 2710(d)(3)(C), the Seventh Circuit concluded that Section 2710(d)(7)(A)(ii) did not abrogate tribal sovereign immunity with respect to the State's claim that the tribe had violated a revenue-sharing provision of the compact. *Id.* at 934. Petitioner contends (Pet. 14) that its claims against respondent could proceed under the Seventh Circuit's view that tribal sovereign immunity is abrogated in disputes arising from the statutorily-permitted subjects of negotiation. But nothing in *Ho-Chunk Nation* suggests that the Seventh Circuit (or the Eleventh Circuit in *Seminole Tribe* (see Pet. 14)) would not require *all* preconditions for a suit under Section 2710(d)(7)(A)(ii) to be satisfied to abrogate tribal sovereign immunity, including the "Indian lands" requirement.

III. THIS CASE IS AN INAPPROPRIATE VEHICLE TO RESOLVE THE PARTIES' DISPUTE

The underlying dispute between the parties turns on whether the Vanderbilt Parcel, purchased by respondent with its MILCSA funds, constitutes restricted fee lands and thus "Indian lands" within the meaning of 25 U.S.C. 2703(4). As the court of appeals correctly concluded, that issue cannot be resolved in an injunctive action brought by petitioner under 25 U.S.C. 2710(d)(7)(A)(ii). Petitioner contends (Pet. 15-16) that the necessary result of the court of appeals' decision is

that petitioner "has no federal-court remedy to stop illegal tribal gaming that takes place on Michigan's own sovereign territory." That is incorrect.

A. Although the court of appeals held that all claims against respondent itself could not proceed under 25 U.S.C. 2710(d)(7)(A)(ii) or were barred by tribal sovereign immunity, it instructed the district court to consider on remand whether Counts IV-VI in petitioner's amended complaint, which are not brought under 25 U.S.C. 2710(d)(7)(A)(ii), may proceed against respondent's Tribal Gaming Commission, or against the Commission's members or the members of respondent's Executive Council in their official capacities. Pet. App. 17a-18a. It is therefore possible that the Indian lands issue will be resolved in these proceedings. The interlocutory posture of this case, and the specific terms of the court of appeals' remand order, thus weigh against this Court's review. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). The remaining defendants have asserted in motions to dismiss that sovereign immunity bars petitioner's claims against them. Docket entry No. 170, at 15-16; *id.* No. 174, at 16-21. But the courts below have not passed on that question, and this Court has not held that sovereign immunity bars such an action for injunctive relief against tribal officials. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 59 (1978).[5]

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[5] The remaining defendants in this case could waive any immunity they may have in order to obtain resolution of the Indian lands issue. That course, however, could be complicated by Count V in petition-

B. There are also other avenues for obtaining a federal-court determination of whether the Vanderbilt Parcel constitutes Indian lands. Respondent's suit against the Governor of Michigan concerning the status of the Vanderbilt Parcel is pending before the same district court judge who is presiding over petitioner's amended complaint. Resp. App. 12-19. Although the Governor has asserted Eleventh Amendment immunity in that suit (see pp. 11-12, *supra*), the district court may conclude that respondent has properly pleaded claims under *Ex parte Young*, 209 U.S. 123 (1908), because respondent seeks to prevent the State from enforcing against respondent state laws that respondent alleges are preempted by IGRA's authorization of gaming on Indian lands. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008). Or the Governor could elect to waive any immunity he may have to obtain resolution of the Indian lands issue.

Furthermore, one or more of the mechanisms described above for determining whether IGRA authorizes class III gaming by an Indian tribe (pp. 2-4, *supra*) may be available here. For example, respondent could request approval from the NIGC of a site-specific gaming ordinance describing the Vanderbilt Parcel and, depending on the outcome, either petitioner or respondent could seek administrative or judicial review of the NIGC's decision. See 25 U.S.C. 2714; 25 C.F.R. 522.7; 25 C.F.R. Pt. 580; 25 C.F.R. 580.10. And, finally, the United States has criminal and civil enforcement authority. See p. 4, *supra*; Pet. App. 17a.

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er's amended complaint, which seeks forfeiture of respondent's gaming machines and the gross receipts from its gaming operations on the Vanderbilt Parcel. Pet. App. 69a-70a.

Regardless of how the issue might ultimately be resolved against other defendants or in other proceedings, the court of appeals correctly concluded that the issue cannot be resolved in an action by petitioner for injunctive relief against respondent under Section 2710(d)(7)(A)(ii).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2013

JOINT APPENDIX

RECORD
AND
BRIEFS

FILED
AUG 23 2013
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No. 12-515

In the Supreme Court of the United States

MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari Filed October 23, 2012
Certiorari Granted June 24, 2013

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TABLE OF CONTENTS

Relevant Docket Entries
United States District Court,
Western District of Michigan,
Consolidated Docket No. 1:10-cv-01273
and 1:10-cv-1278 1–5

Relevant Docket Entries
United States District Court for the
Western District of Michigan
Docket No. 1:10-cv-1278-PLM
(excludes duplicate docket
entries in consolidated case) 6

Relevant Docket Entries
United States Court of Appeals,
Sixth Circuit, Docket No. 11-1413 7

United States District Court,
Western District of Michigan,
Docket No. 1:10-cv-1273,
Complaint, Filed December 21, 2010 8–18

United States District Court,
Western District of Michigan,
Docket No. 1:10-cv-1273,
Brief in support of Motion for Preliminary Injunction filed by Little Traverse Bay Bands of Odawa Indians Filed December 23, 2010

Exhibit 8, Pages 28–52
Memorandum and Materials in Support of Resolution No. 10-5-20 Amendment to Gaming Ordinance, May 26, 2010 19–68

United States District Court,
Western District of Michigan,
Docket No. 1:10-cv-1273,
Motion for leave to file Supplemental Authority and Request for Judicial Notice by plaintiff Little Traverse Bay Bands of Odawa Indians
Filed January 4, 2011

Attachment A
Letter from Tompkins, Solicitor of the Department of Interior, to Gross, Associate General Counsel, NIGC
Dated December 21, 2010 69–101

Attachment B
Memorandum from Michael Gross
Dated December 21, 2010 102–107

United States District Court,
Western District of Michigan,
Docket No. 1:10-cv-1273,
Response to Motion for preliminary injunction filed in 1:10-cv-01278 by Bay Mills Indian Community
Filed January 19, 2011

Exhibit O
Law Enforcement Agreement between
Bay Mills Indian Community and
Otsego County Sheriff's Office 108–115

United States District Court,
Western District of Michigan,
Docket Nos. 1:10-cv-1273, 1:10-cv-1278
Notice of Appeal
Filed March 30, 2011 116–117

United States District Court,
Western District of Michigan,
Docket Nos. 1:10-cv-1273, 1:10-cv-1278
Amended Complaint
Filed August 9, 2011 118–136

The following opinions and order have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

United States District Court,
Western District of Michigan,
Opinion and Order,
Granting Motion for
Preliminary Injunction,
Issued March 29, 2011 ..... 19a-39a

United States District Court,
Western District of Michigan
Amended Complaint
Filed August 9, 2011 ..... 55a-72a
(The amended complaint is reproduced again in the Joint Appendix but the Exhibits are not.)
Exhibit A 73a-96a
Exhibit B 97a-100a
Exhibit C 101a-170a

United States District Court,
Western District of Michigan,
Answer to Amended Complaint
Filed September 30, 2011 ..... 40a-54a

United States Court of Appeals,
Opinion,
Issued August 15, 2012 ..... 1a-18a

Relevant Docket Entries from the United States District Court for the Western District of Michigan Consolidated Docket No. 1:10-cv-01273-PLM and 1:10-cv-1278-PLM

12/21/10	1	Michigan's Complaint
12/23/10	2	Notice of Consolidation
12/23/10	4	Little Traverse Bay Bands of Odawa Indians' Brief in Support of Motion for Preliminary Injunction
01/04/11	7-1	Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to Michael Gross, Associate General Counsel, NIGC (December 21, 2010)
01/04/11	7-2	Memorandum from Michael Gross (December 21, 2010)
01/12/11	12	Bay Mills Indian Community's Answer and Affirmative Defenses to Little Traverse Bay Bands of Odawa Indians' Complaint
01/19/11	13	Michigan's Response in Support of Motion for Preliminary Injunction
01/19/11	14	Bay Mills Indian Community's Brief in Opposition to Motion for Preliminary Injunction
01/28/11	22	Bay Mills Indian Community's Answer to Michigan's Complaint

02/02/11 25 Bay Mills Indian Community's Response to Michigan's Response in Support to Motion for Preliminary Injunction

02/01/11 27 Little Traverse Bay Bands of Odawa Indians' Reply to Bay Mills Indian Community's Brief in Opposition to Motion for Preliminary Injunction

03/29/11 33 Opinion and Order, Granting Motion for Preliminary Injunction

03/30/11 39 Bay Mills Indian Community's Notice of Interlocutory Appeal

05/23/11 52 Little Traverse Bay Bands of Odawa Indians' Amended Complaint

06/09/11 58 Bay Mills Indian Community's Answer to Little Traverse Bay Bands of Odawa Indians' Amended Complaint

06/20/11 61 Appeal Transcript of the Hearing on the Motion for Preliminary Injunction held March 23, 2011

08/09/11 74 Michigan's Amended Complaint

74-1 Exhibit A – Gaming Compact

74-2 Exhibit B – State's letter to Bay Mills

74-3 Exhibit C – Bay Mills' Gaming Ordinance

08/12/11 75 Michigan's Motion to Add Names of Parties Joined

08/15/11 77 Order Granting Michigan's Motion to Add Names of Parties Joined

09/26/11 89 Protective Order regarding confidential information

09/30/11 95 Bay Mills Indian Community's Answer to Michigan's Amended Complaint

09/30/11 96 Bay Mills Executive Council's Answer to Michigan's Amended Complaint

09/30/11 97 Bay Mills Gaming Commission's Answer to Michigan's Amended Complaint

12/09/11 114 Bay Mills Indian Community's Motion to Dismiss Little Traverse Bay Bands of Odawa Indians' Amended Complaint

12/09/11 115 Bay Mills Indian Community's Brief in Support of Motion to Dismiss Little Traverse Bay Bands of Odawa Indians' Amended Complaint

12/09/11 116 Bay Mills Indian Community's Motion to Dismiss Michigan's Amended Complaint

12/09/11 117 Bay Mills Indian Community's Brief in Support of Motion to Dismiss Michigan's Amended Complaint

12/09/11 118 Bay Mills Executive Council's Motion to Dismiss Michigan's Amended Complaint

12/09/11 119 Bay Mills Gaming Commission's Motion to Dismiss Michigan's Amended Complaint and for Judgment on the Pleadings

12/09/11 120 Bay Mills Executive Council's Brief in Support of Motion to Dismiss Michigan's Amended Complaint

12/09/11 121 Bay Mills Gaming Commission's Memorandum in Support of Motion to Dismiss Michigan's Amended Complaint and for Judgment on the Pleadings

01/13/12 138 Michigan's Combined Response to All Defendants' Motions to Dismiss

01/13/12 139 Little Traverse Bay Bands of Odawa Indians' Response in Opposition to Bay Mills Indian Community's Motion to Dismiss

01/27/12 144 Bay Mills Indian Community and Bay Mills Executive Council's Consolidated Reply to Michigan Regarding Defendants' Motions to Dismiss

01/27/12 146 Bay Mills Gaming Commission's Reply in Support of its Motion to Dismiss

01/27/12 148 Bay Mills Indian Community's Reply Brief to Little Traverse Bay Bands of Odawa Indians' Brief Opposing Dismissal of its Amended Complaint

08/15/12 158 Opinion and Judgment of Sixth Circuit

09/06/12 159 Mandate of Sixth Circuit

09/25/12 165 Order Dismissing Case regarding the action filed by Little Traverse Bay Bands of Odawa Indians case number 1:10-cv-1278

09/25/12 166 Judgment in case number 1:10-cv-1278

10/23/12 170 Bay Mills Gaming Commission's Motion to Dismiss Amended Complaint or Alternately for Judgment on the Pleadings

10/23/12 171 Bay Mills Gaming Commission's Memorandum in Support of Motion to Dismiss Amended Complaint or Alternatively for Judgment on the Pleadings

10/23/12 173 Bay Mills Indian Community and Bay Mills Executive Council's Joint Motion to Dismiss Amended Complaint

10/23/12 174 Bay Mills Indian Community and Bay Mills Executive Council's Brief in Support of Joint Motion to Dismiss Amended Complaint

11/20/12 179 Michigan's Combined Response to All Defendants' Renewed Motions to Dismiss

12/17/12 184 Tribal Defendants' Combined Reply in Support of Defendants' Motions to Dismiss

12/28/12 185 Michigan's Supplemental Authority Supporting Its Combined Response to All Defendants' Renewed Motions to Dismiss

Relevant Docket Entries from the United States District Court for the Western District of Michigan Docket No. 1:10-cv-1278-PLM (excludes duplicate docket entries in consolidated case)

12/22/10 1 Little Traverse Bay Bands of Odawa Indians' Complaint

12/22/10 3 Little Traverse Bay Bands of Odawa Indians' Motion for Preliminary Junction

Relevant Docket Entries from the United States Court of Appeals for the Sixth Circuit
Docket No. 11-1413

09/21/11 006111079108 Bay Mills Indian Community's Appellant Brief (corrected)

09/28/11 006111086076 Michigan's Appellee Brief

09/28/11 006111086204 Little Traverse Bay Bands of Odawa Indians' Appellee Brief

10/18/11 006111102098 Bay Mills Indian Community's Reply Brief

08/15/12 006111401850 Opinion of the Sixth Circuit Court of Appeals

08/15/12 006111401851 Judgment of the Sixth Circuit Court of Appeals

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED - LN
December 21, 2010 2:39 PM
TRACY CORDES, CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT OF
MICHIGAN

THE STATE OF MICHIGAN,
Plaintiff,

v

1:10-cv-1273
Paul L. Maloney,
Chief Judge
United States District Court

THE BAY MILLS INDIAN COMMUNITY,
Defendant.

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_____/

COMPLAINT

Plaintiff State of Michigan brings the following Complaint for declaratory and injunctive relief:

JURISDICTION

1. The Court has federal subject matter jurisdiction of this action pursuant to:

a) 28 U.S.C. § 1331, as this Complaint alleges violations of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*;

b) 25 U.S.C. § 2710(d)(7)(A)(ii), as Plaintiff is a State which seeks to enjoin gaming activity conducted in violation of a tribal-state compact; and

c) 28 U.S.C. § 2201, as this Complaint also seeks a declaratory judgment.

PARTIES

2. Plaintiff is the State of Michigan (State).

3. Defendant Bay Mills Indian Community (Bay Mills) is a federally recognized Indian tribe.

VENUE

4. Defendant Bay Mills has its Tribal offices and reservation in Chippewa County, in the Upper Peninsula of Michigan. Venue is therefore appropriate in this Court pursuant to 28 U.S.C. § 1391(b)(1).

GENERAL ALLEGATIONS

5. On or about August 20, 1993, John Engler, the Governor of the State of Michigan at that time, entered into a tribal-state gaming compact (the "Bay Mills compact") with Bay Mills. A true and correct copy of this compact is attached as Exhibit A.

6. The Bay Mills compact permits Bay Mills to operate casino games, also known as "Class III gaming" (which is defined in IGRA, 25 U.S.C. § 2703(8)), on "Indian lands" as defined in Section 2(B) of the compact.

7. Since the Bay Mills compact was signed, Bay Mills has conducted Class III gaming in one or more casinos it operates on Indian lands in Chippewa County in the Upper Peninsula.

8. On or about November 3, 2010, Bay Mills began operating a casino in a renovated building located in or near the village of Vanderbilt (the "Vanderbilt casino") in Otsego County in the Lower Peninsula of Michigan.

9. The land on which the Vanderbilt casino is being operated is not part of the Bay Mills reservation.

10. The land on which the Vanderbilt casino is being operated was acquired by Bay Mills after October 17, 1988.

11. The land on which the Vanderbilt casino is being operated was not contiguous to the boundaries of the Bay Mills reservation on October 17, 1988.

12. The Vanderbilt casino is approximately 100 miles by road from the Bay Mills reservation.

13. The title to the land on which the Vanderbilt casino is being operated has not been taken into trust by the United States for the benefit of Bay Mills.

14. The land on which the Vanderbilt casino is being operated is not subject to restriction by the United States against alienation.

15. Bay Mills does not exercise governmental power over the land on which the Vanderbilt casino is being operated.

16. After consultations between Bay Mills and the State of Michigan failed to resolve this dispute, the State sent a letter on December 16, 2010 to Bay Mills demanding that Bay Mills immediately cease the operation of all Class III gaming at the Vanderbilt casino. A true and correct copy of this letter is attached as Exhibit B.

17. Despite this demand, Bay Mills has refused to cease Class III gaming at the Vanderbilt casino.

18. By entering into the Tribal-State compact, Bay Mills waived its sovereign immunity for purposes of this legal action which seeks injunctive and declaratory relief to remedy violations of the Bay Mills compact and federal law.

COUNT I—VIOLATION OF COMPACT SECTION 4(H)

19. Plaintiff incorporates paragraphs 1-18 above as if fully stated in Count I.

20. Section 4(H) of the Bay Mills compact states: "The Tribe shall not conduct any Class III gaming outside of Indian lands."

21. Section 2(B) of the Bay Mills compact defines "Indian lands" to mean: "(1) all lands currently within the limits of the Tribe's Reservation; (2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and (3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Tribe exercises governmental power."

22. For the reasons stated in paragraphs 9-15 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Bay Mills compact.

23. The operation of Class III gaming at the Vanderbilt casino therefore violates and is a breach of the Bay Mills compact.

24. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II below), and federal anti-gambling

statutes (18 U.S.C. § 1955), it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

25. There is no adequate remedy at law for this violation by Bay Mills of its compact which causes the State irreparable injury.

26. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C.§ 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact, (2) permanently enjoining Bay Mills from conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT II—VIOLATION OF COMPACT SECTION 4(C)

27. Plaintiff incorporates paragraphs 1-26 above as if fully stated in Count II.

28. Section 4(C) of the Bay Mills compact states:

> The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, tribal law, *IGRA, and all other applicable federal law.* This shall include but not be limited to the licensing of the consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81

> and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violation of this Compact, tribal law, *IGRA, or other applicable federal law* shall be corrected immediately by the Tribe. (Emphasis added.)

29. The violation of IGRA, 25 U.S.C. § 2710(d)(1), set forth in Count III below, also violates Section 4(C) of the Bay Mills compact.

30. 18 U.S.C. § 1955 makes it illegal for any person to conduct, finance, manage, supervise or own all or part of an illegal gambling business.

31. An illegal gambling business is defined in 18 U.S.C § 1955 as a gambling business which is a violation of state law in which it is conducted, involves five or more persons and remains in business for more than 30 days, and grosses more than $2,000 in any single day.

32. Operation of the Vanderbilt casino violates Michigan's anti-gambling statute, MCL 750.301 *et seq.*

33. On information and belief, the Vanderbilt casino involves more than five people and grosses more than $2,000 in a single day.

34. Representatives of Bay Mills have stated that the Tribe intends to keep operating the Vanderbilt casino indefinitely.

35. Operation of the Vanderbilt casino therefore violates applicable federal anti-gambling

laws, including 18 U.S.C. § 1955, and therefore violates Section 4(C) of the Bay Mills compact.

36. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates the laws of the State of Michigan and federal anti-gambling statutes, it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

37. There is no adequate remedy at law for this violation by Bay Mills of its compact which causes the State irreparable injury.

38. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C.§ 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact; (2) permanently enjoining Bay Mills from conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT III—VIOLATION OF IGRA

39. Plaintiff incorporates paragraphs 1-38 above as if fully stated in Count III.

40. Section 2710(d)(1) of IGRA permits Class III gaming only on "Indian lands" as that term is defined in IGRA, and only if conducted "in conformance with a Tribal-State compact entered

into by the Indian tribe and the State under paragraph (3) [25 U.S.C. §2710(d)(3)] that is in effect."

41. IGRA defines "Indian lands" to mean: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

42. Based on the facts alleged in paragraphs 9-15 above, the Class III gaming conducted by Bay Mills at the Vanderbilt casino is not being conducted on Indian lands and therefore violates IGRA.

43. The Class III gaming conducted by Bay Mills at the Vanderbilt casino also violates IGRA because, for the reasons stated in Counts I and II of this Complaint, this gaming is not being conducted "in conformance with" the Bay Mills compact.

44. Finally, Class III gaming is prohibited pursuant to 25 U.S.C. § 2719 on the land on which the Vanderbilt casino is located, even if it is Indian lands, because it was acquired by Bay Mills after October 17, 1988 and does not qualify for any of the exceptions described in 25 U.S.C. § 2719(b).

45. There is no adequate remedy at law for this violation by Bay Mills of IGRA which causes the State irreparable harm; since the operation of the Vanderbilt casino violates IGRA it cannot be in the

public interest and the balance of harm of its continued operation weighs heavily in favor of the State.

46. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C.§ 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact; (2) declaring that the gaming at the Vanderbilt casino violates IGRA; (3) permanently enjoining Bay Mills from conducting Class III gaming at the Vanderbilt casino; and (4) granting Plaintiff such other relief as the Court deems appropriate.

Plaintiff further requests that it be awarded its costs and attorney fees incurred in bringing this action.

Respectfully submitted,

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Dated: *12/21/2010*

THE BAY MILLS INDIAN COMMUNITY

MEMORANDUM AND MATERIALS IN SUPPORT OF RESOLUTION NO. 10-5-20 AMENDMENT TO GAMING ORDINANCE

SUBMITTED TO

THE NATIONAL INDIAN GAMING COMMISSION

Presented to
The Hon. George T. Skibine
The Hon. Penny J. Coleman

May 26, 2010

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TABLE OF CONTENTS

INTRODUCTION 1

PART I 1

THE MICHIGAN INDIAN LAND CLAIMS SETTLEMENT ACT: 1

TRANSFER OF TITLE TO RESTRICTED STATUS BY OPERATION OF LAW 1

A. Brief Overview of the Michigan Indian Land Claims Settlement Act 1

1. The Bay Mills Indian Community's Claim Against the United States 1

2. Structure of the Michigan Indian Land Claims Settlement 2

B. MILCSA Land Acquisition Authority 3

C. By Operation of Law, MILCSA Imposes a Restriction Against Alienation on Lands Acquired Pursuant to Section 107(a)(3) 3

1. The Phrase "Indian Lands" 4

2. In MILCSA § 107(a)(3) "As Indian Lands Are Held" Means Restricted Fee 5

a. "As Indian Lands are Held" in Section 107(a)(3) *Does Not* Mean Held in Trust 5

b. "As Indian Lands are Held" in Section 107(a)(3) Does Mean Held Subject to Restrictions Against Alienation 6
3. The Transfer of Title to Restricted Fee Status Occurs By Operation of Law 7
4. MILCSA's Legislative History Supports The Restricted Fee and Legislative Transfer Analyses 9
5. 2002 BIA Memorandum Did Not Squarely Address The Legislative Transfer Question 13

PART II 14

IGRA ALLOWS LANDS ACQUIRED PURSUANT TO MILCSA § 107(a)(3) 14

TO BE USED FOR GAMING 14

A. IGRA Allows Gaming on "Indian Lands" 14
1. MILCSA Lands are "Subject to Restriction by the United States Against Alienation" 15
2. The Tribe will Exercise Jurisdiction Over those Lands 15
a. The Bay Mills Indian Community Will Have Legal Jurisdiction 15
b. The Bay Mills Indian Community Will Exercise Governmental Power 17

B. IGRA's Ban on Gaming on "After Acquired Lands" Does Not Apply to Restricted Fee Lands 18
1. The United States' Position in the Seneca Litigation Supports this Analysis 18
2. The Department's Part 292 Regulations Also Support This Analysis 20

CONCLUSION 22

INTRODUCTION

Land acquired by the Bay Mills Indian Community (Tribe) under the authority of 107(a) of the Michigan Indian Land Claims Settlement Act (MILCSA), using Land Trust funds set aside pursuant to that same section, attains restricted fee status by operation of law as soon as the Tribe acquires unencumbered fee title to the land. This analysis of section 107(a) of MILCSA is consistent with the relevant standards set forth in analogous situations by the National Indian Gaming Commission (NIGC), the Department of the Interior (Department), and the federal courts. *See* Part I below. Further, after attaining restricted fee status, such land will meet the Indian Gaming Regulatory Act's (IGRA's) definition of "Indian lands," will not be subject to IGRA's Section 20 after-acquired lands prohibition, and therefore will be eligible to be used for gaming-related economic development. *See* Part II below.

PART I
THE MICHIGAN INDIAN LAND CLAIMS SETTLEMENT ACT: TRANSFER OF TITLE TO RESTRICTED STATUS BY OPERATION OF LAW

A. Brief Overview of the Michigan Indian Land Claims Settlement Act

1. The Bay Mills Indian Community's Claim Against the United States

The Bay Mills Indian Community is comprised of the "six [Ojibwe] bands residing at and near Sault Ste. Marie," as described in Article 1, First [Paragraph] of the Treaty of July 31, 1855, 11 Stat 621. The Bay Mills bands engaged in numerous treaties with the United States, several of which resulted in legal claims against the federal government which were adjudicated by the Indian Claims Commission.

In 1820 the Bay Mills bands ceded to the United States an area along the St. Mary's River rapids near present-day Sault Ste. Marie, Michigan for construction of a fort. Reserved from the cession was "a perpetual right of fishing at the falls of St. Mary's, and also a place of encampment upon the tract hereby ceded, convenient to the fishing ground." Art. 3, Treaty of June 16, 1820, 7 Stat. 206. In early 1855, the U.S. Army burned to the ground all Indian structures on the encampment and drove out the Ojibwe occupants so that the Corps of Engineers could build a lock. The encampment ground was excavated and the rapids were brought under control by the lock. On August 2, 1855, the Bay Mills Bands

signed another cession treaty relinquishing the encampment grounds and the right of fishing at the falls *(see* 11 Stat. 631). A United States commissioner unilaterally set the value of the Bay Mills bands' 1855 cession, indicated that it would be paid "as annuities are paid." Art. 2, Treaty of August 2, 1855. The amount in fact paid to the Bay Mills bands was ludicrously small, and it formed the basis of the complaint filed by the Tribe before the Indian Claims Commission (ICC) in *Bay Mills Indian Community, et al. v. United States,* Docket No. 18-R. In 1975, the ICC found the amount paid to the Tribe for this cession to be unconscionably low, and accordingly Congress appropriated the settlement funds for the Tribe in that same year. MILCSA provides for the distribution of the judgment for all of these claims.

The major land cession involving the six Bay Mills bands occurred in the Treaty of March 28, 1836 (7 Stat. 491), covering lands identified in Royce Area 205. Approximately 14 million acres, encompassing the east half of Michigan's Upper Peninsula and almost the entire western half of Michigan's Lower Peninsula, were ceded to the United States by the Ojibwe and Ottawa bands living there, including the six Bay Mills bands. The United States compensated the bands for the cession with annuities for 20 years, trade goods, access to technical assistance from mechanics and farmers, etc. The total amount paid to the ceding bands was so far below its actual value that the Bay Mills Indian Community filed suit against the United States before the Indian Claims Commission in Docket 18-E. Another Bay Mills claim, arising under the cession of the St. Martins Islands in the Treaty of July 6, 1820, 7 Stat. 207, was

consolidated for adjudication as Docket 364. Ruling in 1971, the Commission found that the United States obtained $12,142,225 in value from the property, but had paid less than one tenth that amount to the bands. The Commissioner declared this amount unconscionable, and the final judgment of the Commission was reported to Congress as $10,300,250. Although Congress appropriated the judgment funds the following year, since there was no distribution plan, the funds were not distributed. Unfortunately, it would take another 25 years for the Congress to enact a distribution plan by which the Tribe finally would receive compensation for its losses. That distribution plan, enacted on December 15, 1997, was the Michigan Indian Land Claims Settlement Act, Pub. L. 105-143, which finally completed the Bay Mills Indian Community's 50-year effort to obtain compensation and settle its treaty cession-related claims against the United States.

2. Structure of the Michigan Indian Land Claims Settlement

When the claims of the Bay Mills Indian Community were filed with the Indian Claims Commission in Dockets 18-E, 18-R and 364, the Bay Mills Indian Community was the only federally recognized tribe that was a signatory to the Treaty of July 6, 1820 (7 Stat. 207), Treaty of March 28, 1836 (7 Stat. 491), the Treaty of July 31, 1855 (11 Stat. 621), and the Treaty of August 2, 1855 (11 Stat. 631).

When judgment of the Indian Claims Commission in Dockets 18-E and 364 was entered in 1971, the Bay Mills Indian Community was still the only signatory tribe that was federally recognized.

But by 1975 when judgment was entered in Docket 18-R, the Sault Ste. Marie Tribe of Chippewa Indians had been administratively recognized and now participated along with the Bay Mills Indian Community in hearings conducted that year by the Bureau of Indian Affairs on developing a plan for distribution of the funds (as was required by the Indian Tribal judgment Funds Act, 25 U.S.C. § 1401, *et seq.*).

By the time the Bureau of Indian Affairs conducted a second round of distribution plan hearings in 1984, the Grand Traverse Band of Ottawa and Chippewa Indians too had been administratively recognized. Again, no plan for fund distribution was finalized, so then-Congressman Bob Davis introduced legislation in 1987 to effect distribution. Another consultation hearing was conducted by the Bureau in 1988, but no plan was finalized and submitted to Congress as a result.

The Bay Mills Indian Community finally sought judicial enforcement of the provisions of the Indian Tribal Judgment Funds Act by filing suit in 1996 against the Secretary of Interior, the Assistant Secretary for Indian Affairs, the Bureau of Indian Affairs and the Department in the United States District Court for the District of Columbia. The Tribe and the federal defendants agreed to resolve the litigation through the submission of proposed legislation by the Department of Interior to the Office of Management and Budget on or before December 15, 1996, after consultation with Bay Mills, other affected Tribes and any descendency groups. An order implementing the stipulation was

entered by Judge Stanley Sporkin on September 16, 1996.

The Department transmitted a draft bill to the House and Senate by letter dated March 14, 1997. Section 4 provided that each Tribe submit a plan for its respective share. When legislation was introduced as H.R. 1604, the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians participated with Congress in developing their respective tribal plans for inclusion in the legislation. The result is sections 107 (Bay Mills), 108 (Sault Ste. Marie) and 109 (Grand Traverse) of the Michigan Indian Land Claims Settlement Act. *See* Attachment A.

B. MILCSA Land Acquisition Authority

Section 107(a) of MILCSA established a trust fund -- the "Land Trust" — which was created from a portion of the funds received by the Tribe in settlement of the Tribe's Indian Claims Commission cases (*see* discussion in subpart A above). Section 107(a)(3) requires that the Tribe use the proceeds of the Land Trust (*i.e.*, interest generated by the Land Trust) to improve existing tribal land holdings and to acquire new tribal land holdings. Further, it dictates that any new land holdings be held as "Indian lands":

> (3) The earnings generated by the Land Trust *shall be used exclusively* for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange.

> *Any land acquired with funds from the Land Trust shall be held as Indian lands are held.*

MILCSA § 107(a)(3), Pub.L. 105-143, 11 Stat. 2661 (Dec. 15, 1997) (emphasis added). Congress has dictated that the Tribe *must* use these particular settlement funds to improve existing, or obtain new, tribal lands (the funds *"shall be used exclusively"*). Congress also has dictated that land obtained with these particular settlement funds will *not* be land held in fee simple, but rather will be land upon which Congress has bestowed the special legal status of "Indian lands" ("Any land acquired with funds from the Land Trust *shall be held as Indian lands are held*"). More specifically, for the reasons discussed at length below, it is clear that the special legal status conferred on land acquired under MILCSA § 107(a)(3) is that of restricted fee title.

C. By Operation of Law, MILCSA Imposes a Restriction Against Alienation on Lands Acquired Pursuant to Section 107(a)(3)

Obviously, the phrase "as Indian lands are held" must have some meaning other than that the lands simply will be held in fee by the Tribe. Under well-established principles of statutory construction, statutory language is to be interpreted in such a way as to give it meaning -- Congress is presumed not to include meaningless verbiage in a statute. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." Sutherland Statutory Construction, § 46.6 at 230; *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.")

(internal quotations and citations omitted). Accordingly, we must assume that Congress would not have included this language in the statute unless Congress intended that the language would have real meaning.

If Congress had intended that the Tribe simply would hold land purchased with the Land Trust settlement funds in fee simple, there would have been no need to say anything at all about how the land would be held. Land purchased by a tribe outside specific congressional authorization or direction is held in fee simple anyway. *See* Office of the Solicitor, Opinion M-37023, Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands, at 3, 6 (Jan. 18, 2009). (Federal restrictions against alienation do not automatically attach to off-reservation parcels acquired by a tribe in fee simple. Rather, a restriction on alienation attaches only by operation of treaty language or a tribe-specific statute [which is what MILCSA provides], or through some other type of federal involvement or "extenuating circumstances".) *See* Attachment B. *See also* December 19, 2008 Letter from Acting Deputy Assistant Secretary George Skibine to Lac Du Flambeau Band of Lake Superior Chippewa Indians President Edwards (land in Illinois purchased by Tribe in fee simple, without more, is not subject to the restriction against alienation of Indian lands embodied in the Indian Trade and Intercourse Act, 25 U.S.C. § 177).

Accepting the principle that "as Indian lands are held" cannot mean land held in fee simple and therefore must mean something else, we set out

below the applicable rules of statutory construction, the legislative history of MILCSA, and a comparison to other statutes, all of which confirm that lands validly acquired by the Tribe with funds from the Land Trust are held in restricted fee status by operation of law.

1. The Phrase "Indian Lands"

The phrase "Indian lands" has been used by Congress in a large number of statutes, and while the definitions vary depending on the context, in virtually every case the definition of "Indian lands" includes lands held in restricted fee status. *See* the following federal statutes, all of which expressly include restricted fee lands within the definition of "Indian lands": The Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470b(b)(4); the Federal Cave Resources Protection Act of 1988, 16 § 4302(3); the McKinney-Vento Homeless Assistance Act, 20 U.S.C. § 7713(7); the Indian Tribal Economic Development and Contract Encouragement Act of 2000, 25 U.S.C. § 81(a)(1); the Indian Health Amendments of 1992, 25 U.S.C. § 1680(n)(b); the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4); the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1702(3); the National Community Service Act of 1990, 42 U.S.C. § 12511(10); and the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2102(c).[1] Of particular importance for the Tribe's

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[1] In only three cases did Congress fail to expressly include restricted fee lands within the meaning of "Indian lands." In each of those statutes, restricted fee land would appear to be included by implication. The Public Land Corps Healthy Forests Restoration Act of 2005, 16 U.S.C. § 1722, defines

purposes of course is the "Indian lands" definition in IGRA, which also encompasses restricted fee lands. There, Indian lands are defined as including:

> (A) all lands within the limits of any Indian reservation, and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual *subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.*

25 U.S.C. § 2703(4) (emphasis added).

From these definitions it is clear that the term "Indian lands" refers to a special status assigned to land held by Indian tribes which status includes trust land, reservation land, and land held in restricted fee status. It follows, then, that the phrase "held as Indian lands are held" has a particular meaning relating to that special status, whether it be trust, reservation or restricted fee — it is something

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Indians lands to include any Indian reservation, public domain allotments, former reservations in Oklahoma, ANCSA lands, and lead held by dependent Indian communities (the definition here is broad enough to encompass restricted fee lands); the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. 4302(4), which uses the "Indian Country" definition of 18 U.S.C. 1151 (and therefore encompasses restricted fee land); and the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291, which defines Indian lands to include lands within Indian reservations, and all lands "held in trust for or *supervised by an Indian tribe*."

other than the holding of land in fee simple status. For the reasons discussed below, in the case of section 107(a)(3) of MILCSA, that phrase must mean held in restricted status.

2. In MILCSA § 107(a)(3) "As Indian Lands Are Held" Means Restricted Fee

a. "As Indian Lands are Held" in Section 107(a)(3) *Does Not* Mean Held in Trust

What is obvious about the language of section 107(a)(3) is that it does not use any of the phraseology normally associated with the acceptance of trust title. It does not direct or otherwise authorize the Secretary to accept trust title, nor does it indicate that the United States will acquire trust title by operation of law — indeed it does not use the word "trust" in any fashion whatsoever. In obvious contrast are other provisions in MILCSA pertaining to other tribes where trust language specifically is used. *See* MILCSA § 108(f) (providing that lands acquired using amounts from interest or other income from the Sault St. Marie Self-Sufficiency Fund "shall be held in trust by the Secretary for the benefit of the tribe").[2] In light of the fact that other parts of the statute specifically provide that lands acquired with settlement funds shall be held in trust, Congress' decision not to use the same trust language for the Bay Mills Indian Community's land acquisition must be understood as intentional and meaningful, and the term "held as Indian lands are

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[2] *Cf.* MILCSA § 108(b)(4) (lands purchased with Self-Sufficiency Fund monies to be held as Indian lands are held).

held" means something other than lands held in trust.[3] "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) *(quoting Chicago v. Environmental Defense Fund,* 511 U.S. 328, 338 (1994)). In other words, the plain language of MILCSA makes a clear distinction as to how lands acquired for different tribes under the Act are to be treated differently. Congress' direction that some lands shall be "held in trust" and that other lands shall be "held as Indian lands are held" signals a clear difference in how the land shall be held, and establishes that lands acquired by Bay Mills are not held as trust lands.

The Department of the Interior has indicated its agreement that lands acquired pursuant to MILCSA Section 107(a)(3) are not to be held in trust. In a letter dated September 10, 2002, the Midwest Regional Director wrote to the Tribe that "[b]ecause Congress used both the phrase 'as Indian lands are

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[3] In a discussion of tribal property interests, Cohen points out that a number of treaties avoided the problem of defining the nature of Indian land interests by "providing that specified lands should be held 'as Indian lands are held," and that this kind of phrasing should be read to mean that the United States will hold title in trust for the tribe. Felix S. Cohen, Handbook of Federal Indian Law, Ch. 9, § A.1.a (1982 ed.). While this construction may apply generally to the executive's establishment of reservations by treaty, in the case of a statute enacted by Congress where certain sections specifically designate that land shall be held in trust, and other sections use the phrase "held as Indian lands are held", this general rule of construction for treaty provisions would not apply.

held' and the phrase 'in trust for the benefit of the tribe,' it is reasonable to assume that Congress intended different meanings for the two different phrases in the same statute." *See* Letter from The Hon. Larry Morrin, BIA Midwest Regional Director, to L. John Lufkins, President of the Bay Mills Indian Community (September 10, 2002) ("Morrin Letter") at 3, provided at Attachment C.

b. "As Indian Lands are Held" in Section 107(a)(3) *Does* Mean Held Subject to Restrictions Against Alienation

If the phrase "held as Indian lands are held" does not mean held in fee simple, and does not mean held in trust, the only other thing it can mean is that the land is held as a reservation, or that it is land held subject to restriction against alienation. While MILCSA includes no specific language stating that the land shall be part of the Tribe's reservation, lands validly set aside for tribal use or occupancy, even without specific use of the words "reserved" or "reservation", may be considered reservations. *See* Felix S. Cohen, Handbook of Federal Indian Law, ch. 15 § 6 at 296-297 (1942 ed.). But absent any of the specific language typically used in statutory reservations, *see id.* (describing typical statutory reservations language such as "reserved for the sole use and occupancy"), the better reading of the MILCSA phrase "held as Indian lands are held" is that lands acquired pursuant to Section 107(a)(3) are to be held subject to restriction against alienation. Both the courts and the Department have found that a restriction on alienation attaches to land held in fee by a tribe where there is federal involvement

with the acquisition or supervision over the land. *See generally* Cohen, § 15.06[4], citing *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957) (tribal land purchase in fee is subject to restriction on alienation where there is sufficient "federal involvement" to establish the restriction, in *Alonzo*, that federal involvement took the form of certain Congressional enactments ... relating to the Tribe's purchase of the land). *See also* Office of the Solicitor, Opinion M-37023, Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands (Jan. 18, 2009) (restrictions against alienation attach to certain Indian fee lands by operation of law, including "tribe-specific statutes"). Cohen reaches the same conclusion, stating that the phrase "held as Indian lands are held" vests recognized and enforceable property rights in the Tribe. Cohen, Handbook of Federal Indian Law, Ch. 9, § A.1.a (1982 ed.). In this case, Congress clearly has enacted a "tribe-specific statute" that not only provides for the acquisition of the property but in fact actually requires the Tribe to use its Land Trust settlement for tribal land-related purposes.

Indeed the Department of the Interior's own fee-to-trust regulations define restricted fee lands in order to set them apart from the Department's administrative fee-to-trust process, and it is clear from that definition that land acquired under MILCSA more properly fits within that definition. *See* 25 C.F.R. § 151.2(e) (defining "restricted land" or "land in restricted status" as "land the title to which is held by ... a tribe and which can only be alienated or encumbered by the owner with the approval of the secretary because of limitations contained in the conveyance instrument pursuant to Federal law or

because of a Federal law directly imposing such limitations.") (emphasis added); *see also* 25 C.F.R.§ 151.1 ("[A]cquisition of land . . . by Tribes in fee simple status is not covered by these [fee-to-trust] regulations even though such land may, by operation of law, be held in restricted status following acquisition.").

For all of the forgoing reasons, it is clear that land acquired by the Bay Mills Indian Community pursuant to section 107(a)(3) of MILCSA will be restricted fee lands.

3. The Transfer of Title to Restricted Fee Status Occurs By Operation of Law

Congress provided no role at all for the Secretary in the acquisition of title to land purchased with Land Trust funds. This Congressionally-mandated lack of administrative involvement in the Tribe's acquisition of the land leads to the conclusion that MILCSA's directive that "[a]*ny land acquired with funds from the Land Trust shall be held as Indian lands are held*" effects a legislative transfer of title (once the land is purchased by the Tribe) into restricted fee status by operation of law without need for any administrative action.

A comparison between MILCSA and the Seneca Nation Land Claims Settlement Act, 25 U.S.C. § 1774, *et seq.*(Seneca Settlement Act) illustrates this point. Like MILCSA, the Seneca Settlement Act authorizes the Seneca Nation to acquire lands with funds appropriated by the statute, and it provides for the transfer into restricted fee of such lands by operation of law:

> Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of ... (25 U.S.C. 177), such lands shall be subject to the provisions of that Act, and shall be held in restricted fee status by the Seneca Nation.

25 U.S.C. § 1774f(c). While the Seneca Settlement Act includes an administrative step (the Secretary must receive and consider comments) not required by MILCSA, the mechanism by which title is transferred to restricted fee status is in principle the same: once the Tribe meets the requirements of the statute the restriction automatically attaches to the Tribe's fee title. *See NIGC Approval of Seneca Nation of Indians' Class III Gaming Ordinance, January* 20, 2009 NIGC letter to Seneca President Barry E. Snyder at 7 (Attachment M) ("Here, DOI certified that according to the provisions of the SNSA, the Buffalo Parcel *became restricted fee land by operation of law* on December 2, 2005.") (emphasis added).

The very same principles are illustrated by other act of Congress which effected a legislative transfer of trust title. In the Valles Caldera Preservation Act, Pub. L. 106-248, 114 Stat. 598 (2000), Congress authorized the federal acquisition of the Baca Ranch in New Mexico for preservation purposes, and provided the Santa Clara Pueblo the right to acquire certain portions of the Baca Ranch for fair market value. With respect to lands acquired by the Pueblo under that authority, Congress provided:

> As of the date of acquisition, the fee title lands, and any mineral estate underlying

> such lands, acquired under this subsection by the Pueblo of Santa Clara are deemed transferred into trust in the name of the United States for the benefit of the Pueblo of Santa Clara and such lands and mineral estates are declared to be part of the existing Santa Clara Indian Reservation.

§ 104(g)(2), Pub.L. 106-248, 114 Stat. 598. Although the Valles Caldera legislation requires that the Secretary and the Pueblo first agree on which lands the Tribe will be assigned the right to acquire, once the lands are identified, as in MILCSA, the Secretary has no involvement in the actual purchase of the lands by the title, and once purchased, the lands by operation of law are held in a specified status on behalf of the tribe (in the Pueblo's case, in trust status). There is no further action required by the Secretary once the Pueblo acquires title to the property — the terms of the statute dictate how the lands will be held and effectively transfer the land's title into that status.

In a similar statute, Congress transferred land held by the United States for the Flandreau, South Dakota Boarding School into trust for the Flandreau Santee Sioux Tribe:

> That all of the right, title, and interest of the United States in 80 acres of land ... acquired by the United States for the Flandreau Boarding School at Flandreau, South Dakota, and no longer used for such purposes; together with improvements thereon, are hereby declared to be held by the United States in trust for the Flandreau Santee

> Sioux Tribe, subject to all valid existing rights-of-way.

Pub.L. 88-483, 78 Stat 595 (1964). Again, like MILCSA and the Valles Caldera legislation, no further Departmental action is required; the lands are transferred into trust on behalf of the Tribe by operation of law. Also similar to MILCSA, this legislative transfer was made in connection with claims made by the Santee Sioux under the Indian Claims Commission Act, and Congress directed that the Indian Claims Commission (ICC) should consider whether the value of the title conveyed by the statute should be set off against any claim against the United States determined by the ICC. *Id* Other legislative transfer statutes use similar language that transfers land into trust by operation of law. *See,* e.g., Pub.L. 106-228, 114 Stat. 462 (2000) (certain land held in fee by Mississippi Choctaw "is declared to be held by the United States in trust for the benefit of the Mississippi Band of Choctaw Indians"); Utah Schools and Exchange Act, Pub.L. 105-335 (1998) (automatically transfers state-owned lands into trust for the tribes). As with these other statutes, land acquired pursuant to MILCSA section 107(a)(3) is by operation of law transferred into an inalienable status (in MILCA's case into restricted fee rather than trust) without the need for any administrative action to give effect to the restriction.

Finally, the conclusion that land acquired pursuant to section 107(a)(3) attains restricted status by operation of law (and accordingly requires no administrative action) is further supported by the fact that the Department of the Interior has no role

in the expenditure of funds from the Land Trust to purchase lands pursuant to section 107(a)(3). Section 107(a)(6) provides:

> Notwithstanding any other provision of law, the approval of the Secretary of any payment from the Land Trust shall not be required and the Secretary shall have no trust responsibility for the investment, supervision, administration, or expenditure of funds from the Land Trust.

The plain language of section 107(a)(3) and section 107(a)(6) makes clear that the Secretary has no role in the acquisition of land pursuant to MILCSA.

For all these reasons, by operation of law MILCSA automatically imposes a restriction on alienation on land validly acquired by the Tribe pursuant to section 107(3)(a) without further administrative action.

4. MILCSA's Legislative History Supports The Restricted Fee and Legislative Transfer Analyses

MILCSA's legislative history underscores the analyses provided above that the land is to be held in restricted fee and that it acquires that status by operation of law rather than by administrative action.

Congress initially intended that lands acquired by Bay Mills would be held in trust, but the House Committee purposely changed that approach before enacting the bill into law. NIGC cannot ignore

Congress' deliberate action. "While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." Sutherland Statutory Construction, § 46.6 at 247-48. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza Fonseca,* 480 U.S. 421, 442-43 (1987); *see also Chickasaw Nation v. United States,* 434 U.S. 84, 93 (2001). As shown below, Congress clearly discarded language providing that lands acquired by Bay Mills would be held in trust, and instead replaced that language with a phrase that allows the land rather to be held in restricted fee.

As originally introduced by Congressman Kildee, H.R. 1604 mandated that lands acquired with earnings generated by the Land Trust *"shall be held in trust* by the United States for the Bay Mills Indian Community." *See* H.R. 1604 IH at § 7(a)(3) (emphasis added). *See* Attachment D. On June 24, 1997, the House Resources Committee held a hearing on the bill. H.R. Rep. No. 105-352, at 9 (Oct 28, 1997). *See* Attachment E. Shortly after that hearing, the Department of the Interior submitted proposed "technical amendments" to the Committee for its consideration. Among other things, the Department expressly requested that the Committee modify the sentence "Any lands so acquired shall be held in trust by the United States for the Bay Mills Indian Community" so as to make clear that the Secretary was not required to take such land into trust but

rather "that the Secretary retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act." July 15, 1997 Letter from Assistant Secretary Ada E. Deer to Chairman Don Young, Committee on Resources at 3. *See* Attachment F. After receiving the Department's proposed "technical amendments," the Committee met to consider the bill and adopted by voice vote an amendment in the nature of a substitute "to make certain technical corrections proposed by the Administration[.]" H.R. Rep. No. 105-352, at 9. *See* Attachment E. The substitute bill reported out of Committee did not change a single word of § 7(a)(3). *See* Attachment G. In other words, the House Resources Committee rejected the Department's request that language be adopted to make the Bay Mills acquisition a discretionary trust acquisition.[4]

Then, Congress went even further, and it stripped out the language that would have required Bay Mills land acquisitions to be held in trust. More specifically, as described in the relevant Committee Report, issues had arisen among the tribes regarding the legislation, and the House Resources Committee had worked with the tribes such that "[t]hese issues have been resolved *to the satisfaction of the Tribes* and descendancy groups involved and the Committee plans to address them with a floor amendment to H.R. 1604[.]" H.R. Rep. No. 105-352, at 9 (emphasis added). *See* Attachment E. On November 4,1997, the

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[4] "Committee Reports represent the most persuasive indicia of congressional intent in enacting a statute." Sutherland Statutory Construction, § 48.6, at 571-72.

full House considered the Committee's most recent version of H.R. 1604 that addressed tribal concerns. The only substantive amendments to section 7(a)(3) (what would become section 107(a)(3) in the final statute) were made in this version, which was passed by the House by voice vote. The amendments made were as follows:

> *The earnings generated by the Land Trust shall be used ~~annually and~~ exclusively for* ***improvements on tribal land or*** *the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land so acquired with* ***funds from the Land Trust*** *shall be held as* ***Indian lands are held*** *~~in trust by the United States for the Bay Mills Indian Community~~.*

H.R. 1604 EH at § 7(a)(3). *See* Attachment H. Accordingly, not only did the House reject the Department's proposed amendments on this section to turn this language into discretionary trust acquisition language, Congress went even further by removing any need for administrative action whatsoever, and making the land subject to a restriction on alienation by operation of law once the land is acquired. Amendments made to other sections of the Act demonstrate that the House rejected Interior's comments on how lands would be held under the Act. Most notably, the House added section 8(f) to the Sault Ste. Marie Tribe plan which provides that "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe." Contrary to the Department's

request, Congress did not provide language in section 8(f) that would have allowed the Secretary to retain discretion under the Act as to whether to acquire lands, nor did it provide that this legislative mandate did not repeal the limitations in section 20 of IGRA.

The Senate Committee on Indian Affairs also held a hearing on H.R. 1604 — the day *before* the House vote on that legislation. *See* S. Hrg. 105-413.[5] *See* Attachment I. The Department's testimony explained that its comments were "directed *toward the most recent version* of H.R. 1604, *which is to be presented on the House Floor tomorrow. . .* [and that the Department] support[s] the enactment of H.R. 1604 with certain technical and clarifying amendments, which are truly in the nature of technical amendments, which will be provided both to the House and Senate staff for, hopefully, incorporation into the bill." *Id.* at 29 (emphasis added).

The legislative record is clear that both bodies of Congress rejected the Department's comments on the land acquisition provisions contained in the legislation as passed by the House. Regarding § 7(a)(3) [section 107(a)(3)], the Department appears to have requested that the sentence "[a]ny land acquired with funds from the Land Trust shall be

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[5] Senator Inouye noted the uniqueness of the situation, explaining that "[vie are considering a measure that has yet to be passed by the House of Representatives, but we consider that justice has been delayed too long, and therefore we intend to report this measure out as soon as you report yours, air." S. Hrg. 105-413 at 28.

held as Indian lands are held" be deleted "because it is unnecessary." *See* Draft Letter from Assistant Secretary-Indian Affairs to Senate Indian Affairs Committee Chairman Ben Nighthorse Campbell, at 2.[6] *See* Attachment J. Apparently, the Department believed that lands acquired pursuant to the Act either were automatically subject to restriction against alienation under the Indian Trade and Intercourse Act (25 U.S.C. § 177) and therefore such language was unnecessary, or that such lands would not be protected in any manner, and therefore such language was unnecessary.

Congress' decision to retain the phrase "shall be held as Indian lands are held" despite Interior's request, combined with the rule that every word in a statute must be given effect, compels the conclusion that such lands are restricted given that tribes do not need federal legislation to acquire fee and freely alienable land. *Cf.* Opinion of the Solicitor, No. M-37023 at 6 (Jan. 18, 2009) ("While the Department has not previously opined on this precise question, Federal restrictions under the Non-Intercourse Act do not automatically attach to off-reservation parcels acquired by a tribe in fee simple absolute."); December 19, 2008 Letter from Acting Deputy Assistant Secretary George Skibine to Lac Du Flambeau Band of Lake Superior Chippewa Indians President Edwards (land in Illinois purchased by

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[6] The Tribe's files contain only the "Draft" letter from the Assistant Secretary. We presume that the Department's final letter did not substantively differ from the Draft. In any event as discussed below, the Senate did not incorporate any of the Interior's comments on the land acquisition sections contained in MILCSA.

Tribe in fee simple, without more, is not subject to 25 U.S.C. § 177). Further, any argument that the phrase had no effect and the land is unrestricted and held in fee simple runs afoul of the overall history surrounding the legislation. After finally providing a modicum of justice to the tribes after extracting 12 million acres of their land for approximately 15 cents an acre, Congress surely did not maintain, over Interior's objection, the particular phrase authorizing the acquisition of land by Bay Mills and yet intend that those lands acquired pursuant to the Act would have no protection whatsoever.

The subsequent history of the legislation further confirms Congress' rejection of Interior's requests to amend the language governing the status of lands acquired pursuant to the Act. As discussed above, Interior's letter requested that the last sentence of § 7(a)(3) [section 107(a)(3)] be deleted.[7] Interior requested that the same sentence be deleted from section 8(b)(4) relating to acquisitions by the Sault Ste. Marie Tribe. Notably, Interior also requested that the Senate delete section 8(f) which provides that any lands acquired by Sault Ste. Marie with interest or other income from the designated fund "shall be held in trust by the Secretary for the benefit of the tribe." Interior's draft requested as follows:

> Section 8(f) should be deleted because it *is superfluous and conflicts with section 8(b)(4), if 8(b)(4) is not deleted.* If Section 8(f) is

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[7] That sentence provides: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held."

> retained, we would like it clarified that the Secretary retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaining Regulatory Act.

Draft Letter from Assistant Secretary-Indian Affairs to Senate Indian Affairs Committee Chairman Ben Nighthorse Campbell, at 2 (emphasis added). *See* Attachment J. Interior's comment that the requirement in 8(f) placing the lands in trust was superfluous and conflicted with the requirement in 8(b)(4) to hold the lands "as Indian lands are held" demonstrates that Interior understood the phrase "as Indian lands are held" to constitute restricted lands. If Interior understood the phrase "as Indian lands are held" to mean simply alienable, fee simple land without any restrictions, a direction by Congress to hold the lands in trust would not be superfluous. However, Interior clearly understood that lands acquired by 8(b)(4) would be held in restricted fee by operation of law because placing the same land in trust would be *superfluous* (because they are already protected against alienation) and in *conflict* with 8(b)(4) because recognized Indian title is either restricted fee or trust land, but not both.

Finally, the legislative record shows that the Senate did not make any amendments to H.R. 1604 that were suggested by the Department. *See* 143 Cong. Rec. S12425-26 (Nov. 9, 1997) (amendments offered in Senate to H.R. 1604). *See* Attachment K. After passing the amendments offered by Senators Murkowski and Inouye, H.R. 1604 passed the Senate

by unanimous consent. On November 13, 1997, the House considered the amendments offered by the Senate and again did not incorporate any of Interior's proposed amendments to the sections relating to land acquisitions pursuant to the Act. The House ultimately accepted all of the Senate's amendments but one and sent the bill back to the Senate. *See* Attachment L. The Senate receded from the one amendment rejected by the House and the President signed the legislation into law on December 15, 1997. *See* Attachment L.

In sum, the extensive legislative history of MILCSA confirms that lands acquired pursuant to section 107(a)(3) are restricted fee lands by *operation of law* because Congress rejected Interior's request to modify the legislation to provide for discretionary trust acquisitions. *Further, such lands are restricted fee lands rather than trust lands or alienable, fee simple lands, because Congress purposefully discarded "held in trust," replaced that language with "held as Indian lands are held,"* and rejected the Department's request that the phrase be deleted.

5. 2002 BIA Memorandum Did Not Squarely Address The Legislative Transfer Question

In 2002, the BIA Midwest Regional Director issued a letter to the Bay Mills Indian Community's then-President regarding the land acquisition provisions contained in MILCSA as applicable to the Tribe. Letter from The Hon. Larry Morrin, BIA Midwest Regional Director, to L. John Lufkins, President of the Bay Mills Indian Community (September 10, 2002) ("Morrin Letter") *See* Attachment C. The Morrin Letter was issued in

response to the Tribe's request that the Secretary accept *trust title* to 235 acres of land purchased with money from the Tribe's Land Trust pursuant MILCSA. *Id. at* 1. The Tribe believes that this land already has attained restricted fee status.[8]

The Regional Director analyzed MILCSA's land acquisition section in responding to the Tribe's request. He framed the issue as follows: "[T]he real question is ... does the MILSCA (sic) provide mandatory acquisition authority for the Bay Mills Indian Community." *Id.* He concluded that, "land acquisition authority in MILCSA is not mandatory," and, "the Bureau should process trust applications ... as discretionary trust acquisitions." *Id. at* 7. In other words, the Morrin Letter addresses only the question whether MILCSA provides mandatory trust acquisition authority to the Secretary, and he finds that it does not. The Martin Letter does not address at all whether MILCSA effectuates a legislative transfer of title by operation of law as discussed in Part I.C.3 above.

While Regional Director Morrin rejected the idea that MILCSA vests the Secretary with mandatory trust acquisition authority on behalf of the Tribe, he also acknowledged the possibility that MILCSA could provide for lands acquired by the Tribe to be held in restricted fee, explaining:

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[8] The Tribe did request that the Department acquire trust title to 40 of those acres in trust for the use of its community college, and the Tribe believed that trust status was necessary to ensure that certain kinds of federal funding would be available to the community college.

> The use of the language, "Any land acquired with funds from the Land Trust shall be held as Indian lands are held" is not a clear statement that the acquired lands are to be held in trust, or more particularly that the acquisition authority is mandatory. *Indian lath may be held in a variety of ways, including in* trust by the United States, *subject to restrictions on alienation,* or owned in fee by the Indian Tribe. Certainly the language does not provide clear mandatory acquisition authority.

Id. at 2-3 (emphasis added).

At no time did the Midwest Regional Director squarely address whether Congress directed that lands purchased by the Tribe pursuant to section 107(a)(3) be held in restricted fee. Rather, the Regional Director's discussion focused on the Secretary's role in trust land acquisition, where he indicated that the intent of the Department's proposed changes to MILCSA was "to retain the Secretary's discretion to acquire land in trust, not to change how the land acquired with the funds from the Land Trust would be held." *Id.* at 3. As discussed further in Part I.C.4 above, the Regional Director's assertion[9] that MILCSA's legislative history

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[9] The Regional Director asserted that Congress changed the proposed language of MILCSA "to retain the Secretary's discretion to acquire the land in trust, not to change how the land acquired with the funds from the Land Trust would be held." Morin Letter at 3. He added, "the change in language, following a request from the Department to deify the statute to retain the Secretary's discretionary authority, is an indication that the authority was not meant to be mandatory." *Id.*

supported his conclusion was based upon a mistaken view of MILCSA's legislative history. Although the proposed changes may have reflected *Interior's* intent, Congress in fact rejected the Department's proposed amendments to the relevant sections of the MILCSA.

In sum, MILCSA was enacted to compensate the Tribe by distributing funds awarded to it by the Indian Claims Commission, and by allowing the Tribe to enhance its land base through purchase and exchange of new, restricted lands to replace the lands it lost. The Morrin Letter did not squarely address the Tribe's authority to acquire title to land with MILCSA funds; instead, it merely addressed whether MILCSA provided for a mandatory acquisition of trust title by the Secretary. By its terms, MILCSA allows the Tribe to use settlement funds to acquire title to new lands, and it provides that such lands, by operation of law, will be restricted from alienation upon acquisition by the Tribe.

PART II

IGRA ALLOWS LANDS ACQUIRED PURSUANT TO MILCSA § 107(a)(3) TO BE USED FOR GAMING

A. IGRA Allows Gaming on "Indian Lands"

The Indian Gaming Regulatory Act allows tribes to conduct gaming operations on "Indian lands." *See* 25 U.S.C. § 2710(6) and (d). IGRA defines the term:

> (4) The term "Indian lands" means —

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or *held by any Indian tribe --- subject to restriction by the United States against alienation* and *over which an Indian tribe exercises governmental power.*

25 U.S.C. § 2703(4) (emphasis added). For the reasons set forth below, lands validly acquired by the Tribe pursuant to Section 107(a)(3) of MILCSA fall within IGRA's definition of "Indian lands." Further, as also discussed below, because such lands will be held in restricted fee, they will not be subject to IGRA Section 20's prohibition on gaming on after-acquired lands. Finally, it also is clear that the Tribe will exercise governmental power over the land. Accordingly, lands validly acquired pursuant to section 107(a)(3) are eligible for gaming.

1. MILCSA Lands are "Subject to Restriction by the United States Against Alienation"

As discussed in detail in Part I above, once the Tribe validly acquires fee title to land using MILCSA Section 107(a) Land Trust funds, by operation of law the land will become restricted against alienation. Accordingly, the land will meet the requirement in 25 U.S.C. § 2703(4)(B) that off-reservation land must either be held in trust or be held "subject to restriction by the United States against alienation."

2. The Tribe will Exercise Jurisdiction Over those Lands

IGRA permits a tribe to conduct gaming on "Indian lands" over which the tribe, as a legal matter, possesses governmental jurisdiction. *See* 25 U.S.C. § 2710(b) and (d). Where Indian lands are located off-reservation, IGRA further requires that the tribe exercise "governmental power" over the Indian lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). A tribe must have legal jurisdiction over the land before the tribe can, as a factual matter, exercise "governmental power" over the land. *See NIGC Approval of Seneca Nation of Indians' Class III Gaming Ordinance, January* 20, 2009 NIGC letter to Seneca President Barry E. Snyder at 8 (Attachment M); *Mechoopda Indian Tribe of the Chico Reservation,* NIGC Memorandum at 3 (2003) ("[t]ribal jurisdiction is a threshold requirement to the exercise of governmental power"); *Bear River Band of the Robnerville Rancheria,* NIGC Memorandum at 4 (2002).

a. The Bay Mills Indian Community Will Have Legal Jurisdiction

As a matter of law tribes are presumed to possess governmental jurisdiction within "Indian country." As recently articulated by NIGC,

> The presumption of jurisdiction exists for any federally recognized tribe acting within the limits of Indian country. This jurisdiction, an inherent sovereign power, can only be modified by a dear and explicit expression of Congress.

NIGC *Seneca* Letter at 8 (internal citations omitted); *see also* NIGC *Mechoopda* Opinion at 3; NIGC *Robnerville* Opinion at 5.

"Indian country" is defined in 18 U.S.C. § 1151 and applies both to criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 n.5 (1987); NIGC *Seneca* Letter at 8-9. "Indian country" includes the following geographic areas:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Thus, Congress's definition of "Indian country" includes reservations, dependent Indian communities and Indian allotments *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527 (1998).

In *Venetie,* the Court considered whether land acquired pursuant to the Alaska Native Claims

Settlement Act (ANCSA) and held in fee simple by the Native Village of Venetie constituted "Indian country" and was therefore subject to tribal jurisdiction. The Court noted that because ANCSA "revoked the Venetie Reservation" and Indian allotments were not at issue, the question was whether the Tribe's land constituted a dependent Indian community. *Venetie*, 522 U.S. at 953. Based on earlier precedent which Congress essentially codified in section 1151, the Court held that "dependent Indian communities" under section 1151(6) are those lands that satisfy two criteria: (1) the land "must have been set aside by the Federal Government for the use of the Indians as Indian land;" and (2) the land "must be under federal superintendence" *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998); NIGC *Seneca* Letter at 9.

In its approval of the Seneca Nation's gaming ordinance, NIGC explained that "[a]lthough for many the term 'Indian country' may be perceived as synonymous with the reservation system, this perception is erroneous because the term is not so limited. Reservation status is not necessary for a finding of Indian country. NIGC *Seneca* Letter at 9. Citing to numerous Supreme Court and Circuit decisions, NIGC appropriately concluded that restricted fee land that satisfies both criteria, regardless of whether it has been declared a reservation, constitutes "Indian country." NIGC *Seneca* Letter at 9; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *United States v. Sandoval*, 231 U.S. 28 (1913) (restricted fee land constitutes Indian

country); *United States v. Roberts,* 185 F.3d 1125 (10th Cir. 1999).

Here, once the Bay Mills Indian Community purchases the title to land with earnings generated from the Land Trust, the land passes into restricted fee status by operation of law pursuant to MILCSA Section 107(a)(3) and constitutes a "dependent Indian community" under 18 U.S.C. § 1151. The MILCSA restricted fee land is "validly set apart for the use of the Indians *as Indian land*" by Congress. *Venetie,* 522 U.S. at 529 (*quoting United States v. McGowan,* 302 U.S. 535, 539 (1938)). Indeed, MILCSA closely tracks the Court's enunciation of the test in *Venetie* and *McGowan* by mandating that lands acquired pursuant to section 107 "shall be held *as Indian lands are held.*" Lands "held as Indian lands are held" constitutes recognized title that is subject to the Indian Trade and Intercourse Act, 25 U.S.C. § 177. *See* Treaty with the Menominee, Art. 2, 10 Stat. 1064 (1854);[10] *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405 (1968);[11] *Cayuga*

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[10] "Article 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country . . [legal description of reservation lands]."

[11] "The Menominee Tribe of Indians was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854. 10 Stat. 1064. By this treaty . . the United States confirmed to them the Wolf River Reservation 'for a home, *to be held as Indian lands are held*' . . . [T]he language 'to be held as Indian lands are held' includes the right to fish and to hunt.. . . The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing." *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405 (1968).

Indian Nation v. Cuomo, 758 F.Supp. 107, 110 (N.D.N.Y. 1991), *rev'd on other grounds, Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005).[12] Because land validly acquired pursuant to Section 107(a)(3) is subject to the restriction on alienation embodied in the Indian Trade and Intercourse Act, it also meets the government supervision requirement. As the Supreme Court acknowledged in *Venetie*, "federal restrictions on the lands' alienation" constitute an "'exercise of the government's guardianship over the tribes and their affairs.'" 522 U.S. at 528 *(quoting United States v. Sandoval*, 231 U.S. 28, 48 (1913). *See also* NIGC *Seneca* Letter at 9. Further, as restricted fee land the property will be regulated by a multitude of statutes, (including IGRA) passed by Congress that place such lands under federal superintendence. Thus, once validly purchased with Land Trust funds, land obtains restricted fee status and the Bay Mills Indian Community will, as a legal matter, possess jurisdiction over it.

b. The Bay Mills Indian Community Will Exercise Governmental Power

Having established jurisdiction over the Parcel, the Tribe will then be able to demonstrate that it will exercise present-day governmental power over the property as required by IGRA Section 4(4)(B), 25 U.S.C. § 2703(4)(B). NIGC recently explained that it "has not formulated a uniform definition of "exercise

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[12] [I]f an Indian tribe possesses recognized title in certain land, then Congress, and only Congress, may divest the tribe of its title to such land." *Cayuga Indian Nation v. Cuomo*, 758 F.Supp. at 110.

of governmental power" but rather decides that question in each case based upon all the circumstances." NIGC *Seneca Letter at* 10. Of course present-day governmental power over the land cannot be established before the land is acquired in restricted fee. NIGC *Mechoopda* Opinion at 5. However, in multiple analogous situations both NIGC and Interior have found that an applicant tribe will exercise governmental powers over lands once the lands are acquired in trust or restricted fee. *See* NIGC *Mechoopda* Opinion at 5;[13] Interior *Pomo of Upper Lake* Indian Lands Determination at 7.[14] In the case of the Bay Mills Indian Community, it is clear that the Tribe will exercise governmental authority over its MILCSA section 107(a)(3) land once it is acquired because the Tribe will build a gaming facility on the property and regulate its

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[13] The Tribe has submitted information indicating that, once the land is in trust, it will exercise governmental authority over the parcel through various environmental, zoning, trespass, law enforcement and other ordinances and programs. We can reasonably rely on the Tribe's representations and assume for the purpose of this opinion that the Tribe will exercise those authorities when the land is acquired in trust." NIGC *Mechoopda Opinion* at 5.

[14] "Governmental authority will be exercised once the fee-to-trust process is complete. The Tribe has entered into a Memorandum of Understanding (MOU) with the Lake County government addressing civil jurisdiction and development of the property.. . . Moreover, the prospective development of a gaming ordinance and the regulation of the proposed gaming operation are indicators of the exercise of governmental power. If the Secretary accepts the land into trust, it will qualify as Indian lands under IGRA." Interior *Porno of Upper Lake* Indian Lands Determination at 7.

operations pursuant to its federally approved tribal gaming ordinance.[15]

B. IGRA's Ban on Gaming on "After Acquired Lands" Does Not Apply to Restricted Fee Lands

Section 20 of IGRA provides that gaming "shall not be conducted on lands *acquired by the Secretary in trust* for the benefit of an Indian tribe after October 17, 1988" unless specific exceptions apply. 25 U.S.C, 2719(a) (emphasis added). As discussed in detail below, the Department of the Interior and NIGC have concluded that IGRA's prohibition against gaming on lands acquired after October 17, 1988 does not apply to restricted fee lands that constitute Indian country. The Department of the Interior articulated its conclusion through rulemaking that implements IGRA's Section 20 and in Solicitor M-Opinion M-037023, dated January 18, 2009. (M-Opinions are "binding on all Departmental offices . . . and may only be modified or overruled by the Solicitor, Under Secretary or Secretary." *See* M-Opinion M-37003, dated January 18, 2001 and attachments thereto.) NIGC concurred in the Department's analysis and conclusion that Section 20 does not apply to restricted fee lands when it approved the Seneca Nation of Indians' Class III Gaming Ordinance.

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[15] Once acquired in restricted fee status, several of the Tribe's laws will become applicable to the parcel, including the Tribe's NIGC-approved gaming ordinance and the Tribal Code (which includes provisions governing the Tribe's court and criminal justice systems).

Set forth below is a brief summary of the United States' articulation of this position in approvals involving the Seneca Nation; following that is by a summary of the Department's Section 20 (25 C.F.R. Part 292) regulations and M-Opinion finding that restricted lands are not subject to IGRA's Section 20 prohibition against gaming on after acquired lands. Based on analyses adopted by both the Department and NIGC, it is clear that lands acquired by the Bay Mills Indian Community pursuant to MILCSA will not be subject to the prohibition set forth in Section 20 of IGRA.

1. The United States' Position in the Seneca Litigation Supports this Analysis

The United States has relied on this same analysis in its ongoing defense of NIGC's approval of the Seneca Nation of Indians' (Seneca's) Gaming Ordinance. In 2002, NIGC approved a Seneca gaming ordinance that included a non-site specific general definition of tribal lands eligible for gaming that was consistent with IGRA's definition of "Indian lands." In 2005, Seneca purchased land in Buffalo, New York and, pursuant to the requirements of the Seneca Nation Settlement Act (25 U.S.C. § 1774 *et seq.*),[16] requested that the Department confirm the

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[16] The Chairman's analysis began with the Seneca Nation Settlement Act (SNSA), 25 U.S.C. § 1774. The SNSA settled disputes over leases between the Seneca Nation, the village of Salamanca, New York and the United States. In the settlement the Seneca Nation was awarded $60,000,000 for their claims against the government and also for agreeing to offer new leases in Salamanca. 25 U.S.C. § 1774(d). The Seneca Nation was authorized to use these funds to acquire "land within the aboriginal area in New York or situated within or near

status of that land as being held in restricted fee. Once the Department completed the administrative work required by the Seneca Nation Settlement Act, title to the land transferred to restricted fee by operation of law (this occurred in December 2005).

In January 2006, opponents to Seneca's proposed Buffalo casino filed suit challenging, among other things, NIGC's 2002 approval of the Nation's gaming ordinance. The District Court found that NIGC's approval of the Nation's gaming ordinance was arbitrary and capricious because NIGC did not issue an Indian lands determination for the general locations set forth in the Nation's gaming compact with the State. The court vacated NIGC's approval of the ordinance and remanded the matter back to the agency to determine whether the Buffalo site constituted "Indian lands" under IGRA. *See Citizens Against Casino Gambling in Erie County v. Kempthorne,* 471 F.Supp.2d 295 (W.D.N.Y. 2007).

Shortly thereafter, Seneca submitted an amended gaming ordinance to NIGC for approval. The amended ordinance modified the definition of tribal lands to include the legal description of the Buffalo site. NIGC approved the amended ordinance on July 2, 2007 after finding that 1) the Buffalo site constituted Indian lands; 2) that "restricted lands" were subject to Section 20 of IGRA; and 3) that Seneca's restricted lands were acquired pursuant to a settlement of a land claim and therefore were

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proximity to former reservation lands." 25 U.S.C. § 1774f(c). Unless the Secretary objects within thirty days of the comment period the land becomes subject to the provisions of 25 U.S.C. § 177 (Non-Intercourse Act)[16] and is "held in restricted fee." Id.

excepted from IGRA Section 20's general prohibition on gaming on newly acquired lands.

Opponents to the Nation's Buffalo casino again filed litigation challenging NIGC's approval of Seneca's new gaming ordinance. The district court again set aside NIGC's approval of the amended 2007 ordinance as arbitrary and capricious, this time finding that the Seneca Nation Settlement Act did not settle a land claim and therefore that the lands acquired in Buffalo pursuant to the Act did not satisfy the requirements of IGRA Section 20's settlement of a land claim exception (25 U.S.C. § 2719(b)(1)(B)(i)). The court agreed with NIGC that IGRA Section 20's general prohibition on gaming on lands acquired after the enactment of IGRA applied to all lands, including restricted fee lands. *See Citizens Against Casino Gambling in Erie County v. Hogen*, No. 07-CV-0451S (W.D.N.Y. July 8, 2008).

A few months after the Department of the Interior's regulations governing section 20 of IGRA. (discussed in detail in Part (b) below) became effective, the Seneca Nation submitted an amended gaming ordinance to NIGC for approval. The amended ordinance again included a legal description of its Buffalo site in its definition of Nation lands. Based on its application of the Department's recently promulgated regulations, NIGC approved the Seneca Nation's ordinance.[17] Chairman Hagen explained that the Department's recent "change of course" in its regulations led NIGC

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[17] *NIGC Approval of Seneca Nation of Indians' Class III Gaming Ordinance*, January 20, 2009 NIGC letter to Seneca President Barry E. Snyder (Attachment M).

"to review this new ordinance and the agency's Indian lands analysis afresh." *Id. at* 2.

Turning to whether the Seneca Nation's restricted fee lands in Buffalo were eligible for gaming under IGRA, NIGC concurred in Interior's recently promulgated regulations which interpreted the restrictions contained in section 20(a) to apply only to lands acquired in *trust* after the effective date of IGRA. *Id.* at 7. NIGC stated that this conclusion "adheres to the explicit language of the statute" because section 20 "only references trust land acquired after October 17, 1988. It says nothing of land held by a tribe subject to restriction by the United States against alienation." *Id.* at 11. Pointing to the Department's differing definitions of trust and restricted land in 25 C.F.R. Part 151 and federal statutes distinguishing between trust and restricted lands, NIGC concluded that ("in trust' is a term of art that has a specific meaning with the realm of federal Indian law." *Id.* at 17. NIGC concluded that based on "Congress' history of enacting legislation pertaining to trust and restricted land, it is evident that Congress in this context understood that the two types of Indian lands are not the same and intended to use the term 'in trust' accordingly. . . . [Conversely the] use of the term *restricted* in some provisions of IGRA and not in [section 20] evinces Congressional intent to exclude it from the general prohibition." *Id.* at 17-18.

NIGC further explained that even if the statutory language of section 20 was ambiguous, the Department's and NIGC's interpretation of that ambiguous language is reasonable. NIGC explained

that the conclusion that Indian country restricted lands were not subject to IGRA's prohibitions "comports with the plain language of IGRA, resolves any ambiguity in favor the tribes, as required by the Indian canon of construction, and promotes IGRA's underlying policies and objectives [of encouraging tribal economic development, self sufficiency and strong tribal government]." *Id at* 20. Accordingly, based on this recent plain reading of IGRA, NIGC approved the Seneca Nation's gaming ordinance.

2. The Department's Part 292 Regulations Also Support This Analysis

In 2008 the Department of the Interior promulgated regulations implementing the exceptions to IGRA Section 20's general prohibition against gaming on after-acquired lands, published now at 25 C.F.R. Part 292, which make clear that Section 20 applies only to trust land, and not to restricted fee lands. In the preamble to the regulations, the Department explained that "[t]he omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA, including section 2719(a)(2)(A)(ii) and 2703(4)(B)." 73 Fed. Reg. 29354, 29355 (May 20, 2008).

Following issuance of the regulations, on January 18, 2009, then-Solicitor David Bernhardt issued a memorandum opinion further explaining the Department's interpretation of Section 20 in the Part 292 regulations, and justifying the Department's departure from its pre-Part 292 position that Section 20 barred gaming on both after-acquired trust and restricted fee lands.

Memorandum Opinion M-37023 re: Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands (Jan. 18, 2009). The Solicitor concluded that upon further investigation the Department "has since determined that the better view of the law is that when a tribe purchases new lands off-reservation and those lands are held by the tribe in fee, the land is not, without more, automatically subject to restrictions against alienation." *Id.* at 6.

In reaching this conclusion, the Solicitor first examined the basic attributes of trust land and restricted fee land, explaining that the Secretary of the Interior "lacks any general authority to place restrictions on lands tribes acquire in fee." *Id* at 3. The only authority that the Secretary has to acquire and place restrictions on lands for Indians is through Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465. But land acquired under the IRA is held by the United States in trust, it is not held by the tribe as restricted fee land. Restricted fee lands are created by operation of law, either pursuant to the terms of a specific treaty or statute (such as the Seneca Nation Settlement Act or MILCSA), or more generally the Non-Intercourse Act. Land purchased in fee by a tribe outside the reservation boundaries is not, however, without more *(e.g.,* a specific statute or treaty), subject to the Non-Intercourse Act and is not considered "Indian country". The Solicitor relied on the United States' position in *Cass County v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103 (1998), to support his conclusion that "the Non-Intercourse Act's Federal protections against alienation do not extend to off-reservation lands owned by a tribe in fee unless some extenuating

circumstances exist." *Id. at 7.* The memorandum also relied on the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of New* York, 544 U.S. 197 (2005), to support the Department's view that a tribe's purchase of land in fee outside of the reservation does not establish a tribe's sovereignty over that land because the IRA provides the "proper avenue for [a tribe] to reestablish sovereignty over territory." *Id* at 6.

Against this background, the Solicitor explained that the Department had concluded that the language in Section 20 was plain and that Congress clearly meant for the prohibition against gaming on after-acquired lands to apply only to trust land for three reasons. First, the terra "in trust" has "a common and generally well-accepted meaning in Indian law." Congress is familiar with this meaning and chose specifically to apply Section 20 to this form of land. Second, the statute expressly applies to "lands acquired in trust by the Secretary," and as previously discussed, the Secretary does not acquire restricted fee lands — they are acquired and owned by tribes. Third, lands held in trust by the Secretary may be different from restricted fee lands in certain respects, depending on the terms of the specific statutes and implementing regulations. *Id* at 5-6. For these reasons, and because the Department's prior interpretation was based on the "misapprehension of the law" that off-reservation lands purchased by tribes automatically would be subject to restrictions against alienation, the Solicitor concluded that the plain language in Section 20 could not be ignored, and was properly implemented in the new Part 292 regulations.

In sum, the Department's Part 292 regulations are based on the presumption that lands purchased by a tribe in fee that are located outside the boundaries of the reservation are not subject to the restrictions against alienation imposed by the Indian Trade and Intercourse Act unless Congress has dictated otherwise. Conversely, in cases where a specific statute creates the restrictions against alienation for land purchased by a tribe, or effects a legislative transfer of such lands in restricted fee status, such as in MILCSA, such lands would be eligible for gaming under IGRA and the Department's Part 292 regulations, because as the Part 292 regulations make clear, the prohibition against gaming on after-acquired lands in Section 20 does not apply to restricted fee lands. Accordingly, land acquired pursuant to MILCSA section 107(a)(3) is not subject to IGRA section 20's general ban on gaming on after-acquired off-reservation lands.

CONCLUSION

For all of the foregoing reasons, once the Tribe acquires fee title to lands purchased with the proceeds of the Land Trust, the Tribe's fee title will become restricted from alienation by operation of law pursuant to the Michigan Indian Land Claims Settlement Act Section 107(a)(3).[18] Further, once the

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[18] In the unlikely event that NIGC, the Department of the Interior or a court were to subsequently determine that restricted fee lands are subject to IGRA's general prohibition against gaming on lands acquired after 1988, the Tribe maintains that lands acquired pursuant to section 207(a)(3) of the Michigan Indian Land Claims Settlement Act satisfy IGRA's "settlement of land claim exception," 25 U.S.C. 2719(b)(1)(B)(i), and respectfully requests the opportunity to

restriction on alienation attaches to the property, the property will become eligible for gaming because it is not subject to the restrictions set forth in Section 20 of IGRA on lands acquired in trust after October 17, 1988.

If you have any questions, please contact President Jeff Parker, tribal attorneys Ms. Kathryn Tierney and Mr. Chad DePetro (all of whom can be reached at (906) 248-3241) or Ms. Heather Sibbison at (202) 457-6148.

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provide additional information and analysis on this issue should NIGC, the Department or a court find that the prohibitions contained in section 20 apply to restricted fee lands.

United States Department of the Interior
OFFICE OF THE SOLICITOR
DEC 21 2010

Mr. Michael Gross
Associate General Counsel, General Law
National Indian Gaming Commission
1441 L Street, NW
Washington, DC 20005

Re: Bay Mills Indian Community Vanderbilt property, Indian lands opinion

Dear Mr. Gross:

This is in response to your letter dated November 9, 2010, in which you state that the Bay Mills Indian Community (the Tribe) recently opened an off-reservation gaming facility on a parcel that it purchased in Vanderbilt, Michigan (the Vanderbilt site). You asked for my opinion whether the Vanderbilt site is held in restricted fee under the Indian Gaming Regulatory Act (IGRA) by virtue of the fact that the Tribe purchased the land using money from its land trust under the Michigan Indian Land Claims Settlement Act of 1997 (the MILCSA). As I understand it, the NIGC is attempting to determine whether it has regulatory jurisdiction over the Tribe's Vanderbilt site. Such regulatory jurisdiction would exist only if the Vanderbilt site qualifies as *Indian lands* under IGRA.

According to the warranty deed for the Vanderbilt site, the Tribe purchased the property in August 2010 from Treetops Acquisition Company,

LLC, a Michigan Limited Liability Company. The legal land description on the warranty deed follows:

> Lands in the Township of Corwith, County of Otsego, Michigan described as:
>
> A parcel of land on part of the Northwest 1/4 of Section 22, Township 32 North Range 3 West, according to the Certificate of Survey recorded in Liber 515, pages 93 and 94, Otsego County Records, described as: Beginning at the Northwest corner of said Section 22; thence South 88°15'18" East, 1321.66 feet along the North line of said Section 22; thence 1099.04 feet along a curve to the left, said curve having a radius of 5844.58 feet and a long chord of 1097.42 feet bearing South 21°33'41" West and being along the Westerly Right-of-Way line of Limited Access 1-75; thence continuing South 22°56'39" West, 440.43 feet along said Right-of-Way line; thence continuing South 45°47'56" West, 460.00 feet along said Right-of-Way line; thence continuing South 56°47'56" West, 112.50 feet along said Right-of-Way line; thence North 89°30'40" West, 209.68 feet; thence 537.75 feet along curve to the right, said curve having a radius of 1432.69 feet and a long chord of 534.60 feet bearing North 14°48'58" West, being along the centerline of Highway Old 27; thence North 00°05'27" West, 1611.53 feet along the West line of said Section 22 to the Point of Beginning.

Warranty Deed between Treetops Acquisition Company, LLC and the Bay Mills Indian Community, Otsego County Mich. Liber 1237 at 261 (Aug. 27, 2010).

This deed describes a parcel of land containing about 47 acres in Otsego County, in the northern part of Michigan's Lower Peninsula. It is located about 87 miles away from the Tribe's headquarters and reservation in Chippewa County, in the northern part of Michigan's Upper Peninsula-over 100 miles away by road.

As explained below, it is my opinion that the Vanderbilt site was not acquired in conformance with the MILSCA and it is not a restricted fee site.

Indian Gaming Regulatory Act

In IGRA, the term *Indian lands* is defined to mean:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4).

The NIGC's regulations clarify the definition of *Indian lands* for purposes of IGRA. Those regulations provide:

> Indian lands means:
>
> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either-
>
> > (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> >
> > (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12.

The question presented now is whether the Tribe's fee land purchase in Vanderbilt was transformed, by operation of law, into any of the three categories of *Indian lands* under IGRA-reservation, trust, or restricted fee. As I understand it, your inquiry focused on the restricted fee category because the Tribe previously submitted legal memoranda to the NIGC and the Department arguing that position.[1] In developing my opinion, I

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[1] The Bay Mills Indian Community, Memorandum and Materials in Support of Resolution No. 10-5-20 Amendment to Gaming Ordinance, Submitted to the National Indian Gaming Commission (May 26, 2010); The Bay Mills Indian Community, Memorandum and Materials in Support of Resolution No. 10-2-9 Amendment to Gaming Ordinance, Submitted to the National

have carefully considered the Tribe's legal memoranda. I have also considered a legal analysis submitted by four other tribes in Michigan that argues against the Bay Mills position,[2] as well as correspondence issued by the Michigan Attorney General's Office and other relevant materials.

Importantly, we are not presented here with a fee land purchase by a tribe using general tribal funds. Rather, the Tribe has submitted evidence showing that the land was purchased with earnings from a special fund created by a tribal-specific statute. Therefore, this analysis is focused on, and limited to, an interpretation of the MILCSA.[3]

Indian Gaming Commission (Feb. 25, 2010); The Bay Mills Indian Community, Request for an Indian Lands Opinion, Submitted to the Department of the Interior (July 7, 2009). The Tribe withdrew each of these requests before receiving responses from the NIGC or the Department.

[2] Letter from Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Bank of Potawatomi Indians, Match-e-Be-Nash-She-Wish Band of Pottawatomi Indians, and Saginaw Chippewa Indian Tribe of Michigan to Attorney General Eric Holder, U.S. Dept. of Justice, Secretary Kenneth Salazar, U.S. Dept. of the Interior, Chairwoman Tracie Stevens, National Indian Gaming Commission (Dec. 14, 2010).

[3] The Department has previously articulated its position that unless a tribal-specific statute expressly dictates otherwise, off-reservation lands purchased by a tribe in fee simple do not automatically become restricted fee sites by operation of the Trade and Intercourse Act, otherwise known as the Non-Intercourse Act, codified as amended at 25 U.S.C. § 177. M-Opinion 37023 at 6 (Jan. 18, 2009); *see also* Letter from George T. Skibine, Acting Deputy Assistant Secretary - Policy and Economic Development, to Carl Edwards, President of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin (Dec. 19, 2008) (the Trade and Intercourse Act's

Michigan Indian Land Claims Settlement Act

In 1997, Congress enacted the MILCSA, 105 Pub. L. 143, 111 Stat. 2652. The purpose of the statute was to provide plans to distribute certain Indian Claims Commission judgment funds that the Department had been holding in trust. Among other things, the MILCSA established a non-expendable land trust for the Tribe.

Congress provided that the principal of the Tribe's land trust was not to be expended for any purpose, but that:

> The earnings generated by the Land Trust shall be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land acquired with funds from the Land Trust shall be held as Indian lands are held.

MILCSA § 107(a)(3).

The Tribe submits, and for present purposes I will assume, that it purchased the Vanderbilt site with earnings from its MILCSA Land Trust. The United States does not hold the deed to the Vanderbilt site in trust, and the Tribe has no current application to place the land into trust. Nor does the Vanderbilt site fall within an existing Indian reservation. Therefore, the issue is whether the language of MILCSA Section 107(a)(3) operated as a

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restrictions on alienation do not apply to off-reservation lands purchased by a tribe in fee simple).

matter of law to create a reservation, trust site, or restricted fee site under IGRA when the Tribe purchased the Vanderbilt site in fee simple.

For two reasons, each sufficient by itself, I conclude that the Tribe's purchase of the Vanderbilt site did not transform it into *Indian lands* under IGRA.

I. Consolidation and Enhancement of Tribal Landholdings

First, under the statute's plain language, MILCSA Section 107(a)(3) does not apply to the Tribe's purchase of the Vanderbilt site. The statute mandates that "earnings generated by the Land Trust shall be used *exclusively* for improvements on tribal land or *the consolidation and enhancement of tribal landholdings* through purchase or exchange." MILCSA § 107(a)(3) (emphasis added). The expenditure in this case was not for an improvement on tribal land, as it was for the purchase of new land rather than for an improvement on existing land. So the only issue is whether the new land purchase in Vanderbilt was made for the "consolidation and enhancement of tribal landholdings ...."

In interpreting a statute, one must always start with the language of the statute itself. *Duncan* v. *Walker*, 533 U.S. 167, 172 (2001). If Congress has provided unambiguous direction within the language of the statute, agencies and courts are obligated to follow it. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The MILCSA does not define the terms *consolidation* and *enhancement*, nor does the statute set forth a

tribal land consolidation area within which Land Trust purchases may be made.[4] Because Congress did not provide a special definition of those terms, it is proper in this instance to rely on their ordinary meanings.

Webster's New Twentieth Century Unabridged Dictionary defines the word *consolidate* as meaning "to unite (various units) into one mass or body." Webster's primary definition of the word *enhance* is "to make greater, as in cost, value, attractiveness, etc.; heighten; intensify; augment." Another definition of *enhance* is "to rise; to increase." But that alternative definition is noted as being archaic.

The Tribe's trust landholdings are all located in Chippewa County, on Michigan's Upper Peninsula. The Vanderbilt site is in Otsego County, on Michigan's Lower Peninsula, over 85 miles away from the Tribe's existing trust landholdings. Furthermore, the Tribe has confirmed with my office that it does not own any other fee lands in Vanderbilt. Given that the Vanderbilt land purchase was over 85 miles away from any other tribal trust lands and not near any other tribal fee lands, it cannot have been acquired for the purpose of consolidating-or uniting-other tribal landholdings. In fact, it could be argued that the acquisition actually results in a further fragmentation of the Tribe's landholdings.

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[4] In addition, I note that the Bay Mills Indian Community does not have a land consolidation plan or tribal consolidation area approved by the Bureau of Indian Affairs. Nor has the Tribe submitted a proposal for any such consolidation plan or consolidation area.

Moreover, the Tribe's submissions do not demonstrate a fulfillment of this requirement. The submissions merely state that the MILCSA's land acquisition authority is "to improve existing tribal land holdings and to acquire new tribal land holdings." Tribe's May 2010 Memorandum at 3; Tribe's Feb. 2010 Memorandum at 3; Tribe's July 2009 Memorandum at 3. The Tribe gives no explanation of its interpretation that MILCSA allows for unlimited acquisitions of "new tribal land holdings." The Tribe's submissions also do not show that the Tribe's purchase in any way consolidated tribal landholdings. My office sought additional information from the Tribe on this point, but as of the date of this letter, no additional information had been provided by the Tribe.

The analysis could end there, because Congress' use of the conjunctive *and* within the phrase *consolidation and enhancement* strongly implies that any Land Trust purchase has to both consolidate and enhance tribal landholdings. *OfficeMax, Inc.* v. *United States*, 428 F.3d 583, 588-90 (6th Cir. 2005) (determining through comprehensive analysis that "dictionary definitions, legal usage guides and case law compel us to start from the premise that 'and' usually does not mean 'or.'").[5]

The presumption that *and* is conjunctive may be rebutted only where the context in which the term is

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[5] *See* Letter from Larry Morrin, BIA Regional Director, to Mr. L. John Lufkins, President of the Bay Mills Indian Community (Sept. 10, 2002) at 2, 4 (stating that the "earnings may also be used to consolidate *and* enhance tribal land holdings through either purchase or exchange." (emphasis in original)).

used or other provisions of the statute dictate a contrary interpretation. *OfficeMax*, 428 F.3d at 589 (citing *Crooks* v. *Harrelson*, 282 U.S. 55, 58 (1930)). In examining the context and other provisions of the MILCSA, I find nothing that warrants such a conclusion. To the contrary, the context and other provisions of the MILCSA demonstrate that Congress knew how to use the word *or* when it intended to provide a choice between alternatives. First, Congress twice used the disjunctive *or* within the very same sentence at issue here when it meant to provide a choice-"improvements on tribal land *or* the consolidation" and "purchase *or* exchange." Moreover, Congress specifically used the disjunctive *or* in a separate but similar section of the MILCSA setting forth the distribution plan for the Sault Ste. Marie Tribe:

> The principal of the Self-Sufficiency Fund shall be used exclusively for investments or expenditures which the board of directors determines-
>
> * * *
>
> (C) will consolidate *or* enhance tribal landholdings.

MILCSA § 108(b)(1) (emphasis added). The same phrase is used in the language relating to the Sault Ste. Marie Tribe's expenditure of Self-Sufficiency Fund income:

> The interest and other investment income of the Self-Sufficiency Fund shall be distributed-

* * *

(5) for consolidation *or* enhancement of tribal lands.

MILCSA § 108(c) (emphasis added).

Because Congress chose to use the word *or* in an otherwise similar section of the statute for the Sault Ste. Marie Tribe, but used the word *and* with regard to the Bay Mills Indian Community, I must assume that the distinction was intentional and that it makes a difference. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another ...."); *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1067 (9th Cir. 1998) ("Congress's use of two distinct phrases leads us to conclude that two different meanings were intended."); 2A Sutherland, Statutory Construction § 4606 (5th ed. 1992 & Supp. 1997) ("When the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."). Because Congress made a choice to create different distribution plans for each of the MILCSA tribes, agencies and the courts are obligated to respect those differences. Therefore, under the Bay Mills distribution plan, the Tribe may use Land Trust earnings to purchase new lands only where such purchases both consolidate and enhance tribal landholdings.

Furthermore, even if Congress had meant to authorize the Tribe to make Land Trust purchases

that either consolidate or enhance tribal landholdings, I do not believe that the Vanderbilt purchase can be said to enhance tribal landholdings. I believe that the term *enhancement* of tribal landholdings means that any Land Trust purchase must somehow enhance *(i.e.,* make greater the value or attractiveness) some other tribal landholding already in existence. Because the Vanderbilt site is very far from all other tribal landholdings, it cannot be said to enhance any of them. Therefore, even under an interpretation where *enhancement* includes the addition of new land, there must be some connection to benefiting existing tribal landholdings. Such a showing has not been made here.[6]

The statute simply cannot be read to authorize the Tribe to purchase additional landholdings in any geographic location with no connection to the intended purposes of the MILCSA, which was the consolidation and enhancement of tribal landholdings. First, such an interpretation would rely on a strained definition of *enhancement.* And second, it would be very unusual. Especially after IGRA became law in 1988, Congress has typically included some geographic guidance when it authorizes a tribe to obtain new lands that will fall

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[6] This discussion highlights the practical necessity and benefit of the Department's position that the MILCSA provides discretionary trust acquisition authority. *See* Section II, *infra;* Letter from Larry Morrin, BIA Regional Director, to Mr. L. John Lufkins, President of the Bay Mills Indian Community at 4-5 (Sept. 10, 2002). Under that interpretation, the Tribe would have to demonstrate to the Secretary that its Land Trust acquisitions conform to the limitations in the MILCSA before the Secretary would accept them into trust.

under its legal jurisdiction. *See, e.g.*, Auburn Indian Restoration Act, 103 Pub. L. 434 § 204 (1994) (codified at 25 U.S.C. § 13001-2); Aroostook Band of Micmacs Settlement Act, 102 Pub. L. 171 § 5(a) (1991) (codified at 25 U.S.C. 1721); Seneca Nation Settlement Act, 101 Pub. L. 503 § 8(c) (1990) (codified at 25 U.S.C. § 1774f(c)); Ponca Restoration Act, 101 Pub. L. 484 § 10(c)(1) (1990) (codified at 25 U.S.C. § 983h(c)(1)).

Moreover, if tribal land purchases made in conformity with Section 107 of the MILCSA become restricted fee *Indian lands* under IGRA, as the Tribe has argued, then interpreting the statute as containing no geographic limitations would produce a result inconsistent with the legislative purpose of IGRA. The legislative purpose of IGRA Section 20, codified at 25 U.S.C. § 2719, was to freeze every tribe's gaming eligible Indian lands as they existed on IGRA's enactment date, subject to several delineated exceptions. Consistent with IGRA's plain language, the Department has interpreted IGRA Section 20's general prohibition against gaming on newly acquired lands to apply only to "lands acquired by the Secretary in trust for the benefit of an Indian tribe." *See* M-37023 (Jan. 18, 2009). Therefore, if the Tribe's land purchases under the MILCSA became restricted fee by operation of law, then the general prohibition against gaming on newly acquired lands would not apply. That alone does not lead to an absurd result, as Congress certainly has created specific gaming opportunities for tribes that faced specific circumstances. But if the MILCSA were to be interpreted as containing no geographic limitations on where the Tribe may purchase lands under

Section 107(a)(3), and considering that the purchasing power of the Tribe's Land Trust earnings may continue indefinitely, then the Tribe potentially could open any number of gaming facilities anywhere in the nation from now through the indefinite future. Given the legislative purpose of IGRA Section 20, along with the nearly complete lack of discussion regarding gaming within the MILCSA's legislative history (see Section II below), it is hard to believe that Congress intended such a result.

It follows that the MILCSA does not transform the Vanderbilt site into *Indian lands* by operation of law. I acknowledge that the second sentence of Section 107(a)(3) does say literally that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." But the words *any lands acquired* should not be interpreted to include lands that were acquired contrary to the parameters of the statute. The second sentence must be read along with the preceding sentence, which includes the limitations just discussed and the mandate that Land Trust earnings shall be used exclusively for those purposes. In order to give meaning to the first sentence, the second sentence must be interpreted to include those limitations as well and therefore affect only those lands that are acquired in conformance with the statute. Because the Vanderbilt site did not consolidate and enhance tribal landholdings, the last sentence of Section 107(a)(3) does not apply and it cannot - under any interpretation - create Indian lands eligible for gaming under IGRA.

II. Held as Indian Lands are Held

Even if the Tribe had used its Land Trust earnings to purchase land in an area that could be said to consolidate and enhance tribal landholdings, I do not believe that the MILCSA would operate as a matter of law to transform that land purchase into *Indian lands* under IGRA. This part of the analysis requires an interpretation of what Congress meant by: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held."

The term *Indian lands* appears in numerous statutes with different definitions. Therefore, although the term appears in both IGRA and the MILCSA, one cannot assume that Congress intended the term *Indian lands* in the MILCSA to mean *Indian lands* as defined under IGRA. There no indication in the MILCSA or its legislative history that Congress intended to adopt the IGRA definition of *Indian lands*. Moreover, doing so would not have provided any guidance on how lands purchased under MILCSA Section 107 are to be held, because IGRA defines *Indian lands* to include reservation lands, trust lands held by tribes or individuals, as well as lands held by tribes or individuals in restricted fee. Furthermore, to conclude that the definition of *Indian lands* in a broadly applied statute such as IGRA is synonymous with similar wording in a tribe specific statute is unpersuasive. MILCSA addresses specific land claims of particular tribe and provides that any lands acquired per its terms will be treated like other Indian lands but it does not dictate any special land status, whereas IGRA is a broad statutory delegation of authority by

Congress to the executive branch that applies to all tribes where the definition of *Indian lands* is used to ascertain the eligibility of tribes to have certain provisions of IGRA apply to them. The former statutory language is for the purpose of stating that lands acquired thereunder will be one of those kinds of Indian lands and the latter statute is to show what kind of land status is necessary to qualify for certain statutory provisions. Given these distinctions, a more in-depth analysis is required.

In its prior submissions to the Department and the NIGC, the Tribe argued that the phrase *held as Indian lands are held* in the MILCSA means that lands purchased by the Tribe with earnings from its Land Trust become automatically subject to a restriction by the United States against alienation (a so-called restricted fee site), therefore qualifying as *Indian lands* under IGRA.

There is no plain meaning of the phrase *held as Indian lands are held.* Neither the full phrase nor the term *Indian lands* are defined in the MILCSA. Nor does the phrase have a precise meaning within the body of Federal Indian law. In practice, Indian lands can be held in a variety of ways-*e.g.*, in fee simple, in restricted fee, in trust for the benefit of a tribe or tribes, in trust for the benefit of individual Indians, and as reservations. Furthermore, these forms of Indian land ownership are not exhaustive and they are not all mutually exclusive. Therefore, the phrase *held as Indian lands are held* does not identify a particular land tenure.

The phrase has appeared in at least two other statutes, but in the other statutes it has been used

only in conjunction with a more specific land holding directive, such as: "the land transferred shall be taken in the name of the United States in trust for the tribe or bands to be held as Indian lands are held, and shall be part of their reservation." 25 U.S.C. § 766 (a); *see also* 25 U.S.C. § 1300f(c) ("The Secretary of the Interior is directed ... to accept on behalf of the United States and in trust for the Pascua Yaqui Tribe, the title to the real property ... and such lands shall be held as Indian lands are held ...."). Those statutes do not help to discern the meaning of the phrase when it appears by itself. In fact, these statutes suggest that use of the phrase *held as Indian lands are held* in isolation does not vest the land with a particular status, and rather, the use of that phrase is merely to reflect Congress' intent that the land should be treated like other Indian lands are treated once some action is taken to establish its status.

The phrase *held as Indian lands are held,* or similarly *held as other Indian lands are held,* appeared in a number of 19th century Indian treaties.[7] The phrase does not have a special meaning relating to the Bay Mills Indian Community, because the Tribe has not provided, and our own research has not uncovered, any treaty

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[7] Treaty Made at Chicago with the United Nation of Chippewa, Ottowa and Potawatamie Indians, 7 Stat. 431 (1833); Treaty with the Winnebagoes, 7 Stat. 370 (1832); Treaty with the Oneida Indians Residing at Green Bay, 7 Stat. 566 (1838); Treaty with the Sioux, 10 Stat. 954 (1851); Treaty with the Menomonee Indians, 10 Stat. 1064 (1854); Treaty with the Mendawakanton and Wahpakoota Bands of Dakota or Sioux Tribe of Indians, 12 Stat. 1031 (1858).

signed by a political predecessor of the Bay Mills Indian Community that used such language.

In each of the treaties where the phrase was used, it was in the context of creating what today we would call a reservation for the subject tribes. The phrase was used in place of a more definitive directive regarding the nature of the underlying land ownership. But this created a legal uncertainty, because the title derived by an Indian tribe on its reservation depends entirely upon the terms of the treaty. Some treaties called for the United States to grant ownership of the reservation lands to the subject tribes in fee simple. Other treaties granted fee ownership to the tribes, but subject to a restriction against alienation. Many other treaties have language that has been interpreted to mean that the United States retained fee title to the lands, with a right of use and occupancy or beneficial interest held by the tribe.[8] Given such a varied background, it was undoubtedly difficult for 19th century treaty drafters to describe a definitive tribal estate. By using the circular phrase *held as Indian lands are held,* the drafters tried to avoid the problem. In his Handbook of Federal Indian Law, Felix Cohen explained:

> [A] number of treaties dodge the problem of defining the Indian estate by providing that specified lands shall be held "as Indian lands are held," or as an Indian reservation, thus

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[8] Such was the case with the Menominee Reservation created by the 1854 treaty cited above, which used the phrase *held as Indian lands are held. See Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968).

> ignoring the fact that considerable differences may exist with respect to the tenures by which various tribes hold their land.

Felix S. Cohen, Handbook of Federal Indian Law, U.S. Dept. of the Interior, Office of the Solicitor at 296 (U.S. Govt. Printing Office 1942) (internal footnotes omitted).

So by its very nature and history, this phrase is ambiguous. Therefore, the Indian canon of construction applies and the statute should be construed liberally in favor of the Tribe. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). The question is whether the MILCSA can be liberally construed as a mechanism that automatically transforms unrestricted fee lands purchased by the Tribe into *Indian lands* under IGRA.

In interpreting an ambiguous statutory provision, it is proper to consult legislative history to discern congressional intent. In this case, the MILCSA includes rather extensive legislative history. Interestingly, this history is almost entirely devoid of any discussion of gaming, but for two comments made by the Department of the Interior. In the first version of the bill, the language that would become Section 107(a)(3) was different. It read:

> The earnings generated by the Land Trust shall be used annually and exclusively for the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land so acquired shall be held in trust by

> the United States for the Bay Mills Indian Community.

HR 1604 § 7(a)(3). After testifying during a hearing before the House Committee on Resources, the Department's Assistant Secretary -- Indian Affairs wrote a letter to the Committee with several proposed technical amendments to this bill. As to the provision at issue here, the letter stated:

> Section 7 is the use and distribution plan for the Bay Mills Indian Community. Section 7(a)(3) provides that earnings generated by its land trust shall be used annually and exclusively for consolidation and "enhancement" of tribal landholdings. It should be clarified whether enhancement includes improvements upon land, or only the acquisition of additional land. This section does not permit the Community to consolidate earnings from the fund for two or more years in order to acquire choicer or more valuable property, or from returning money to the principal of the Land Trust - two options which may give the Community desired flexibility depending on economic conditions.
>
> Section 7(a)(3) provides that "Any land so acquired shall be held in trust by the United States for the Bay Mills Indian Community." It should be clarified that the Secretary retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act.

Letter from Ada E. Deer, Assistant Secretary - Indian Affairs, to the Honorable Don Young, Chairman of the Committee on Resources, U.S. House of Representatives (July 15, 1997).

As you know, Section 20 of the Indian Gaming Regulatory Act prohibits gaming on lands acquired by the Secretary in trust for a tribe after October 17, 1988, the date of IGRA's enactment, subject to several potential exceptions. This, plus a nearly identical comment made in a subsequent Department letter discussed below, is the sole reference to gaming within the legislative history of the MILCSA. The intent of the Department's comment was to clarify that if lands were taken into trust for the Tribe under this statute, then those newly acquired lands would be subject to IGRA's general prohibition against gaming, unless eligible for one of the statutory exceptions.

The Tribe has argued that Congress rejected the Department's proposed changes to Section 7(a)(3), which would become Section 107(a)(3). In so arguing, the Tribe correctly points out that after receiving the Department's letter, the House Resources Committee reported a bill to the full House that did not change a single word of Section 7(a)(3). *See* HR 1604 RH (Oct. 28, 1997). But the bill as introduced on the House floor seven days later contained several changes to Section 7(a)(3). *See* Congressional Record - House H9931, H9933 (Nov. 4, 1997); HR 1604 EH (undated). Specifically, Congress added the Department's suggestion that Land Trust funds should be authorized for use on improvements to existing tribal lands; Congress deleted the word

"annually" and thus accepted the Department's suggestion that the Tribe should be allowed to save its yearly earnings for the purchase of more valuable land; and Congress replaced its original mandatory trust language with the language that became law-that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." Therefore, I do not interpret the Committee's reported bill as a signal that the Committee rejected the Department's recommendations. Rather, it seems more likely that the bill was reported out of committee while changes to the land acquisition sections were still being negotiated. The bill as introduced on the House floor reflected Congress' intent to remove the mandatory trust nature of the acquisition and to default to standard rules applicable to such land acquisitions. The Tribe argues that by removing the mandatory trust acquisition language, Congress intended to remove any need for administrative action and made the land subject to restraint against alienation by operation of law. If that were Congress' intent, I believe Congress would have expressly designated such lands as restricted fee, as it had done so before. *See* discussion of the Seneca Nation Settlement Act of 1990, *infra*.

As further support for this explanation of events, I note that the Sault Ste. Marie Tribe was addressing its land acquisition goals within the bill at the same time. After the Committee reported its bill, but before the bill was introduced on the House floor, the Sault Ste. Marie Tribe was able to have significant changes made to its distribution plan for land acquisition purposes. In the reported bill, the

Sault Ste. Marie Tribe's distribution plan contained no explicit language relating to land acquisition. *See* HR 1604 RH § 8 (Oct. 28, 1997). But by the time the bill was introduced onto the House floor, it contained the following new language relating to land acquisition:

> (b) Use of Principal.-
>
> > (1) The principal of the Self-Sufficiency Fund shall be used exclusively for investments or expenditures which the board of directors determines-
>
> ***
>
> > (C) will consolidate or enhance tribal landholdings.
>
> ***
>
> > (4) Any lands acquired using amounts from the Self-Sufficiency Fund shall be held as Indian lands are held.
>
> (c) Use of Self-Sufficiency Fund Income.- The interest and other investment income of the Self-Sufficiency Fund shall be distributed-
>
> ***
>
> > (5) for consolidation or enhancement of tribal lands.
>
> ***

> (f) Lands Acquired Using Interest or Other Income of the Self-Sufficiency Fund.-Any lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe.

HR 1604 EH § 8 (undated).[9] Thus, Congress' amendments here show a similar intention to treat acquired lands as *Indian lands* and that the designation of that land status would come later under default land acquisition rules, with the exception of paragraph (f) which called for a mandatory land acquisition but perhaps was a mistake by Congress. If Congress had meant restricted fee status, then it could have indicated as much but declined to do so.

On November 3, 1997, the Senate Committee on Indian Affairs held a hearing on the bill. Michael Anderson, Deputy Assistant Secretary for Indian Affairs. testified in support of HR 1604, noting specifically that his testimony was directed toward the most recent version of H.R. 1604, which was to be presented on the House floor the next day. *See* Judgment Funds of the Ottawa and Chippewa Indians of Michigan. Hearing before the Committee on Indian Affairs of the United States Senate, S. Hrg. 105-413 at 29 (Nov. 3. 1997). In other words, Mr. Anderson's testimony was directed toward the bill that used the language "held as Indian lands are held" in the land acquisition sections for the Bay

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[9] The final version of the MILCSA includes this language. 105 Pub. L. 143 § 108 (1997).

Mills and Sault Ste. Marie Tribes. Mr. Anderson stated:

> The Department submitted two draft bills in March to Congress, and also has submitted comments on H.R. 1604, as introduced, to Chairman Don Young last summer, on July 15, 1997. We are pleased to note that while most of the suggestions were incorporated within the latest version, that these basically were agreed to, and we now have basic agreement other than a couple of technical amendments.

Id. at 30.

The technical amendments to which Mr. Anderson referred were subsequently delivered to the Senate Committee on Indian Affairs. *See* Letter from Michael Anderson. Acting Assistant Secretary - Indian Affairs, to Ben Nighthorse Campbell, Chairman, Committee on Indian Affairs (Nov. 12, 1997). But that letter did not reach the Senate before its primary vote on HR 1604, which took place on November 9, 1997, and may not have even reached the Senate before its final action on the bill on November 13, 1997, which was to recede from an amendment not passed by the House. This fact is reflected in a letter written by Solicitor John Leshy to the White House's Office of Management and Budget recommending that the President sign the bill:

> The Department submitted a letter setting forth certain technical and clarifying amendments to the bill which did not reach

> the Senate prior to the vote which took place in that chamber on November 10 [sic], 1997. However, we are considering various administrative and legislative options to address the issues detailed in that letter. Nevertheless, the Department of the Interior supports this legislation as an effective and equitable means of distributing the judgment funds to the affected tribes and lineal descendants.

Letter from John Leshy, Solicitor, to Franklin D. Raines, Director, Office of Management and Budget (Nov. 19, 1997). The President then signed the bill into law on December 15, 1997.

The technical amendments proposed in the Michael Anderson letter included a suggestion regarding Section 7(a)(3). The letter states: "Section 7(a)(3): Delete the last sentence because it is unnecessary." The last sentence to which the letter refers is the sentence at issue here: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held." Similarly, the Michael Anderson letter made the following comment about Section 8(b)(4), the nearly identical counterpart for the Sault Ste. Marie Tribe: "Section 8(b)(4) should be deleted because it is unnecessary and adds nothing to existing law." In addition, the Michael Anderson letter states:

> Section 8(f) should be deleted because it is superfluous and conflicts with Section

> 8(b)(4), if 8(b)(4) is not deleted.[10] If Section 8(f) is retained, we would like it clarified that the Secretary retains discretion under existing regulations (25 C.F.R.
>
> Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act.

Letter from Michael Anderson, Acting Assistant Secretary - Indian Affairs, to Ben Nighthorse Campbell, Chairman, Committee on Indian Affairs at 2 (Nov. 12, 1997) (footnote added).

An important conclusion may be drawn from these portions of the Michael Anderson letter, as compared to the previous Ada Deer letter. Under the revised language in the bill, the Department was no longer concerned that the land acquisition provisions for Bay Mills could be interpreted to provide for mandatory trust acquisition or implicitly repeal any limitations in IGRA. That is evident by the fact that the Michael Anderson letter did not carry the

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[10] It is perhaps not readily apparent how a statutory provision can be both superfluous and conflicting. But I believe that the *superfluous* comment was in reference to the fact that by its plain language, Section 8(b)(4) could be interpreted to apply to any lands acquired using any amounts from the Self-Sufficiency Fund, including both principal and interest income. Under that interpretation, it would not be necessary to have a second section at 8(f) to cover lands acquired using interest from the Self-Sufficiency Fund. This view is also consistent with the Department's characterization of 8(f) as conflicting with 8(b)(4). If 8(b)(4) covered all Self-Sufficiency Fund land acquisitions and was not a mandatory trust directive, then 8(f) would be in conflict if it were interpreted to provide for mandatory trust acquisition of lands acquired using interest income.

concern forward as it related to Bay Mills. At the same time, the Michael Anderson letter did raise the concern as it now related to Sault Ste. Marie, where Congress added the trust acquisition language that had previously applied to Bay Mills. As to the new Bay Mills language, the Department seemed basically satisfied. The suggestion that the *Indian lands* sentence should be deleted as unnecessary is evidence that the Department interpreted it to have no true legal effect. The language was unnecessary because there is no need for federal legislation to acquire fee land and then request that the land be placed into trust under the Secretary's discretionary authority, consistent with the Department's statements in the legislative history. My interpretation is consistent with that position. I believe that the term *held as Indian lands are held* served simply as a congressional affirmation that the statute was not changing any of the standard Indian land acquisition rules.

Had Congress retained its original language, the Tribe would have had a strong argument that any lands purchased with Land Trust earnings would have been subject to mandatory trust acquisition.[11] When the Department raised this concern, Congress responded by amending the bill. By changing the

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[11] The Tribe previously asserted that the final language adopted in Section 107(a)(3) created mandatory trust acquisition authority. In a 2002 letter to the Tribe, the Department expressed its interpretation that the language of Section 107(a)(3) creates discretionary trust acquisition authority. Letter from Larry Morrin, BIA Regional Director, to Mr. L. John Lutkins, President of the Bay Mills Indian Community (Sept. 10, 2002).

language "shall be held in trust" to "shall be held as Indian lands are held," Congress borrowed a phrase and a strategy from the 19th century treaties, which basically was to decline to set forth any specific directive. Instead of defining with particularity how the tribal estate would be owned pursuant to MILCSA Land Trust purchases, Congress borrowed the phrase *held as Indian lands are held* as a way of declining to change the standard rules. It follows that the standard Indian land rules apply. The Tribe may use Land Trust earnings to purchase land in fee simple; the Tribe may then request the Secretary to take such lands into trust for the benefit of the Tribe; the Secretary retains discretion under 25 C.F.R. part 151 to take such lands into trust; and with any such trust acquisition for gaming purposes, the Tribe is subject to the standard analysis for newly acquired trust lands under IGRA Section 20. Unless and until the Secretary acts to accept those lands into trust, any off-reservation lands acquired by the Tribe with Land Trust earnings are held by the Tribe in unrestricted fee.

The Tribe has argued that Congress rejected the Michael Anderson letter's proposed changes to Section 7(a)(3). But in making that argument, the Tribe was not aware that the Michael Anderson letter failed to reach the Senate in time for consideration. Considering that timing, the only thing that can be gleaned from the Michael Anderson letter is the Department's own position with regard to the language at issue.

As to the Department's comments in the earlier Ada Deer letter, the Tribe argued that Congress

actually went the other direction-that Congress replaced the trust language from the bill with the language that such lands "shall be held as Indian lands are held" not only to reject the Department's comment that the Secretary should retain discretion in the matter, but to remove any need for the Secretary to take any action whatsoever by making tribal land purchases restricted fee by operation of law. There is nothing in the legislative history to support the Tribe's view. Nothing in the record suggests that the Tribe requested Congress to make its MILCSA lands automatically held in restricted fee status. And had Congress decided on its own initiative to depart so drastically from the Department's suggestion, one would expect to see some discussion of that fact in the legislative history.

Furthermore, I note that seven years before Congress enacted the MILCSA, it demonstrated that it knew how to specify with particularity that a tribe's land purchases should be held in restricted fee. In the Seneca Nation Settlement Act of 1990, Congress provided:

> LAND ACQUISITION. -- Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation with funds appropriated pursuant to this Act. State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire such lands to comment on the impact of the removal of such lands from real

> property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes [25 U.S.C. § 177], such lands shall be subject to the provisions of that Act and *shall be held in restricted fee status* by the Seneca Nation. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Springs Reservation in accordance with the procedures established by the Secretary for this purpose.

Seneca Nation Settlement Act of 1990, 101 Pub. L. 503 § 8(c)(codified at 25 U.S.C. § 1774f) (emphasis added).

This provision demonstrates that Congress knows how to express its unambiguous intent to place restraints against alienation on acquired land. In the Seneca Nation Settlement Act, Congress not only expressly stated that the land will be held in restricted fee, but it also provided a process for the Secretary of the Interior to determine whether the land should be given special status. This level of detail is in great contrast to the language in the MILCSA. Moreover, the Tribe's submission does not explain why Congress would use the more general phrase in the MILSCA if it had intended to automatically vest lands acquired under that Act with restricted fee status. Indeed, the Department's

regulations define "restricted land" or "land in restricted status" as "land the title to which is held by ... a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of *limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.*" 25 C.F.R. § 151.2(e) (emphasis added). Here, the MILCSA does not reflect a direct imposition of such limitations. It is presumed that Congress knows of its former legislation and passes new laws in view of the provisions of the legislation already enacted. *Navajo Nation v. Dept. of Health & Human Serv.*, 325 F.3d 1133, 1139 n.8 (9th Cir 2003). Therefore, had Congress intended to create restricted fee lands in the MILCSA, it could have followed its precedent in the Seneca Nation Settlement Act and made that intention clear.[12]

Finally, I have considered and rejected an alternative interpretation that the phrase *held as Indian lands are held* in the MILCSA might operate to automatically create the same land tenure as created by the 19th century treaties using the same phrase. In each of those treaties, the United States defined a particular tract of land that was meant to serve as a tribal homeland or reservation. It has since generally been held that unless such treaties

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[12] Even if the MILCSA did transform the Vanderbilt site into restricted fee, the Tribe would still have to demonstrate that it has legal jurisdiction to exercise governmental power over the site in order for the property to be eligible for gaming under IGRA. *See* 25 U.S.C. § 2703(4)(8); 25 C.F.R. § 502.12(b). But because the MILCSA did not transform the Vanderbilt site into restricted fee, I do not have to reach that question.

stated otherwise, the United States retained the fee title to such lands and the tribes were granted a right of occupancy, with attendant hunting/fishing rights, often characterized as a beneficial or trust interest.[13] But Congress specifically amended the MILCSA bill to remove what could otherwise have been characterized as mandatory trust acquisition language, so it was obviously not its intent to create automatic trust lands. Nor can I interpret the MILCSA to create automatic reservations for the Tribe wherever and whenever the Tribe uses Land Trust earnings to purchase real estate. In this modern era of federal Indian law, Congress knows quite clearly how to create or expand Indian reservations, and it did not do so here.

For these reasons, I do not believe that even a liberal construction of the MILCSA can support the Tribe's position that its Land Trust purchases in fee simple automatically become restricted fee lands under the definition of *Indian lands* set forth in IGRA. Thank you for requesting my opinion on this matter. If you have any questions, please do not hesitate to contact me or Senior Attorney Jeffrey Nelson.

Sincerely,
Hilary C. Tompkins
Solicitor

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[13] *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406-408 (1968).

MEMORANDUM FOR THE CHAIRWOMAN

December 21, 2010

From: Michael Gross, Associate General Counsel, General Law

cc: Paxton Myers, Chief of Staff
Dawn Houle, Deputy Chief of Staff
Lael Echo-Hawk, Counselor to the Chairwoman
Jo-Ann Shyloski, Associate General Counsel, Litigation and Enforcement

Re: Bay Mills Indian Community Vanderbilt Casino, NIGC Jurisdiction

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INTRODUCTION

On Wednesday, November 3, the Bay Mills Indian Community opened an off-reservation gaming facility in Vanderbilt, Michigan. The considered opinion of the Department of the Interior Solicitor is that the land is not within a reservation, not held in trust, and not held in restricted fee. Accordingly, the Community's new casino is not on Indian lands within the meaning of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701- 2721, and the National Indian Gaming Commission lacks jurisdiction over it. We are obligated, therefore, to refer the matter to the appropriate law enforcement agencies.

BACKGROUND

The Vanderbilt casino sits upon land described as:

> A parcel of land lying on part of the Northwest ¼ of Section 22, Township 32 North Range 3 West, according to the Certificate of Survey recorded in Liber 515, pages 93 and 94, Otsego County Records, Corwith Township, Otsego County, Michigan, described as: Beginning at the Northwest corner of said Section 22; thence South 88°15'18" East, 1321.66 feet along the North line of said Section 22; thence 1099.04 feet along a curve to the left, said curve having a radius of 5844.58 feet and a long chord of 1097.42 feet bearing South 21°33'41" West and being along the Westerly right-of-way line of Limited Access 1-75; thence continuing South 22°56'39" West 440.43 feet along said right-of-way line; thence continuing South 45°47'56" West, 460.00 feet along said right-of-way line; thence North 89°30'40" West 209.68 feet; thence 537.75 feet long curve to the right, said curve having a radius of 1432.69 feet and a long chord of 534.60 feet bearing North 14°48'58" West, being along the center-line of Highway Old 27; thence North 00°05'27" West, 1611.53 feet along the West line of said Section 22 to the point of beginning, containing 47.55 acres more or less.

The Community purchased the land using money from the land trust established by the Michigan

Indian Land Claims Settlement Act of 1997 (MILCSA), P.L. 105-143, 111 Stat. 2652 (Dec. 15, 1997). MILCSA states that "any land acquired with funds from the Land Trust shall be held as Indian lands are held." *Id.* at § 107(a)(3).

DISCUSSION

IGRA defines *Indian lands* as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). NIGC's implementing regulations clarify:

> *Indian lands* means:
>
> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either-
>
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or

> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. As the Vanderbilt land is neither reservation land nor trust land, it could only be Indian lands under IGRA if it were held in restricted fee. We have enquired of the Solicitor's Office whether the language in MILCSA that this land is to be "held as Indian lands are held" has the effect of making the land Indian land within the meaning of IGRA, and the answer we have received is "no." See letter from Hilary Tompkins, Solicitor, Department of the Interior to Michael Gross, Associate General Counsel, NIGC (December 21, 2010). As the Department of the Interior exercises broad authority over Indian affairs, 25 U.S.C. §§ 2, 9, and has various obligations to the tribes under MILCSA, *see e.g.* §§ 104-106, the statute is the Department's to interpret, and I defer to the Solicitor's opinion. The land is not Indian land within the meaning of IGRA, and as a consequence, NIGC lacks jurisdiction over the Vanderbilt casino.

IGRA, by its terms, applies only to gaming on Indian lands. *See,* e.g., 25 U.S.C. § 2710(a)(2) ("any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter"); 25 U.S.C. § 2710(b)(l) (requiring approved tribal gaming ordinance for the conduct of Class II gaming on Indian lands); *id.* (requiring tribal licensure of each gaming facility on Indian lands); 25 U.S.C. § 2710(b)(4)(A) (permitting licensure of individually owned gaming on Indian lands); 25 U.S.C. §

2710(d)(1) (requiring approved tribal gaming ordinance for the conduct of Class III gaming on Indian lands); 25 U.S.C. § 2710(d)(3)(A) (requiring a tribal-state compact for Class III gaming on Indian lands); Sen. Rep. 100-446 at p. A-I. (IGRA "is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands").

Likewise, the powers IGRA grants the Commission and the Chairwoman extend only as far as Indian lands extend. *See, e.g.*, 25 U.S.C. § 2705(a)(3) (power to approve tribal gaming ordinances for gaming on Indian land); 25 U.S.C. § 2705(a)(4) (power to approve management contracts for gaming on Indian lands); 25 U.S.C. § 2713 (enforcement power for violations of IGRA, NIGC regulations, or tribal gaming ordinances); 25 U.S.C. § 2706(b)(l), (2), (4) (powers to monitor gaming, inspect premises, and demand access to records for Class II gaming on Indian lands); 25 U.S.C. § 2702(3)("The purpose of this Act is ... to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming... ").

In short, in the absence of Indian lands, IGRA grants neither the Commission nor the Chairwoman any jurisdiction to exercise regulatory authority over the Vanderbilt casino. Further, when the

Commission obtains information that may indicate a violation of federal, state, or tribal statutes, it is obligated to turn that information over to the appropriate law enforcement officials. 25 U.S.C. § 2716(b).

If you have any further questions, please do not hesitate to ask.

LAW ENFORCEMENT AGREEMENT
Between
BAY MILLS INDIAN COMMUNITY
and
OTSEGO COUNTY SHERIFF'S OFFICE

THIS AGREEMENT, made by and between Otsego County Sheriff's Office (hereinafter termed SHERIFF), and the Bay Mills Indian Community (hereinafter termed the TRIBE).

Recitals.

The TRIBE is a federally recognized Indian Tribe with a Constitution adopted pursuant to the provisions of the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.*, with authority to enter into this Agreement under Articles II and VI, Section (1)(f).

The SHERIFF is authorized to enter into this Agreement pursuant to the provisions of the Urban Cooperation Act, MCL § 124.501, *et seq.*

The TRIBE wishes to deputize certified police officers of the SHERIFF as Tribal officers to act on the Indian lands of the TRIBE within Otsego County, and the SHERIFF desires to have said officers deputized by the TRIBE.

The TRIBE wishes to establish a cooperative relationship with the SHERIFF by which Tribal officers may be deputized as Deputy Otsego County Sheriffs in the future.

The TRIBE and the SHERIFF wish to establish a comprehensive agreement regarding the scope of each party's law enforcement authority on Indian lands of the TRIBE within Otsego County.

Accordingly, the TRIBE and SHERIFF agree as follows:

1. **Purpose**. The purpose of this Agreement is to maintain and promote the health, safety and welfare of all persons engaged in activities on Indian lands of the TRIBE located in Otsego County through the establishment of mutually agreed upon terms and conditions for the provision of effective law enforcement thereon.

2. **Definitions**.

a. "BIA" means the Bureau of Indian Affairs, U.S. Department of the Interior.

b. "Indian" means any person who is a member of a federally recognized Indian Tribe or who is an Alaskan Native and a member of a Regional Corporation *as* defined in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1606.

c. "Indian country" shall have the meaning established in 18 U.S.C. § 1151, as it may from time to time be amended.

d. "Indian lands" means lands of the TRIBE obtained with funds from the Land Trust under § 107(a) of the Michigan Indian Land Claims Settlement Act, P.L. 105-143,

111 Stat. 2652, 2658, and held in restricted fee title by operation of said law and thereby constituting "Indian country".

e. "MCOLES" stands for the Michigan Commission on Law Enforcement Standards.

f. "Special Law Enforcement Commission" or "SLEC" means authorization issued by the Secretary of the Interior to enforce federal laws in Indian country, pursuant to the provisions of the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801, *et seq.*

g. "Tribal officer" means a law enforcement officer employed by the TRIBE.

3. **Term of Agreement.** The initial term of this Agreement shall be for two (2) years, which shall commence on the date it is executed by both parties. Upon the expiration of the initial term, this Agreement shall automatically renew for a term of four (4) years, and there shall continue to be subsequent additional terms unless either party shall give written notice of its desire to terminate the Agreement not less than 30 days prior to the expiration of any term.

4. **Scope of Deputization.** TRIBE hereby deputizes, in accordance with applicable Tribal law, the Sheriff and his deputies, all of whom shall be certified pursuant to MCOLES, as Tribal officers, and who are listed in the attached appendix. An officer so deputized shall have the police powers conferred upon Tribal officers by the laws of the TRIBE and federal law when on duty and located on

the Indian lands of the TRIBE in Otsego County. The SHERIFF shall ensure that the appendix is kept current, by notifying the TRIBE of any changes in personnel in his Department, including MCOLES certification, as soon as practicable,

This deputization expressly includes authorization by the TRIBE to enter onto its Indian lands at any time in order to carry out law enforcement activities_

The TRIBE shall have the authority not to deputize an officer if good cause not to do so is found to exist. The deputy status of an officer may also be suspended for good cause, upon providing notice to the SHERIFF of such action. The parties agree that deputy status is a privilege and that determination of whether good cause exists to refuse to deputize an officer, or to suspend deputy status of a deputized officer, shall be at the sole discretion of the TRIBE; provided that the TRIBE shall undertake good faith discussions with the SHERIFF prior to exercising its discretion.

5. **Territorial Limitation.** The territorial limits of the powers conferred upon the law enforcement officers deputized under this Agreement shall be coextensive with the territorial limits of the TRIBE's Indian lands in Otsego County, without limitation to the powers conferred upon law enforcement personnel engaged in "fresh pursuit" or "hot pursuit" of an offender as defined under applicable Michigan law; provided that such pursuit shall be undertaken in accordance with the Otsego County Sheriffs written policies regarding such matters.

6. **Enforcement of Federal Laws Applicable in Indian Country.** It is understood and agreed that the execution of this Agreement does not authorize the SHERIFF to enforce federal criminal laws on the TRIBE's Indian lands. The TRIBE agrees to utilize its best efforts to facilitate the issuance of a Deputation Agreement with the BIA which includes SHERIFF" s officers, including the provision of 3-day training course regarding the standards of the U.S. Department of the Interior on federal criminal law and procedures. In the event that the training course is scheduled, attorneys from the Otsego County Prosecuting Attorney's Office will be invited to attend.

7. **Effect on State Jurisdiction.** It is further understood and agreed that this Agreement does not, nor is it intended by the parties hereto to affect, the jurisdiction of SHERIFF to enforce the criminal laws of the State of Michigan against non-Indians who commit a crime against a non-Indian or who engage in conduct constituting a victimless crime, as such term is defined under the laws of the State.

8. **Supervision.** While acting under this Agreement, deputies of SHERIFF shall remain employees of the County, reporting to and supervised by the SHERIFF. It is understood and agreed that the TRIBE's prosecutor shall receive all reports from deputized law enforcement officers concerning matters subject to the TRIBE's criminal jurisdiction.

9. **Tribal Law Enforcement Training.** It shall be the responsibility of the TRIBE to provide to SHERIFF training in Tribal law, Tribal law enforcement procedures and issues concerning

federal Indian law and jurisdiction. Such training shall be provided within 45 days of execution of this Agreement and at least annually thereafter for any officer of SHERIFF who has not completed this training in the previous 12 months. In the event that an officer should decline to participate in such training, the declination shall constitute good cause for the TRIBE to suspend the officer's deputization.

10. **Compensation and Costs.** Each party is responsible for all salaries, benefits and other employment expenses related to employment of their respective enforcement personnel; provided, that in the event that an officer deputized by the TRIBE is required to appear in a Tribal Court proceeding at a location outside Otsego County, his or her travel expenses shall be reimbursed by the TRIBE .

11. **Civil Immunity; Insurance.** All privileges and immunities provided by federal, State and Tribal laws, as well as County ordinances, shall apply to all law enforcement personnel while acting in the course and within the scope of his or her employment or service. Each party shall be responsible for the negligent acts or omissions of its law enforcement personnel. Under no circumstances shall either the TRIBE or SHERIFF be held liable for the acts or omissions of employees of the other party, to the extent that such acts or omissions fall within the scope of this Agreement. Such acts or omissions expressly include claims of false arrest, abuse of authority, false imprisonment and claims arising from alleged deficiencies in training and/or supervision.

The TRIBE agrees to maintain and to name the SHERIFF as an additional insured on an insurance policy in the amount of $5 million per incident insuring against claims for liability related to the TRIBE's law enforcement activities, including activities undertaken by the SHERIFF's deputized officers. Such a policy shall be maintained during the term of this Agreement, and all costs of such coverage shall be borne by the TRIBE. Proof of such coverage shall be provided to the SHERIFF upon request.

12. **Representation.** SHERIFF's deputies shall not represent themselves as a Tribal officer while off-duty.

13. **Warrants.** Arrest and search warrants which are to be executed on the TRIBE's Indian lands shall be issued by the Bay Mills Indian Community Tribal Court. The provisions of Michigan Court Rule 2.615 [Enforcement of Tribal Court Judgments] shall apply to this Agreement.

14. **Modification.** This Agreement may only be modified in writing by mutual agreement of the parties hereto, and which is attached hereto. The parties hereby expressly authorize in advance a modification by which the duties and obligations of the SHERIFF as deputized by the TRIBE shall equally apply to the duties and obligations of the TRIBE's law enforcement officers upon deputization by the SHERIFF.

15. **Termination.** Either party, in its sole discretion and without cause, may terminate this

Agreement at any time upon issuance of 60 days' prior written notice to the other party.

BAY MILLS INDIAN COMMUNITY

By _____
Jeffrey D. Parker, President
Executive Council

Dated: _____

OTSEGO COUNTY SHERIFF

By _____
James D. McBride
Sheriff
Dated: _____

APPENDIX
to
LAW ENFORCEMENT AGREEMENT

Officers Deputized by the Bay Mills Indian Community
December 15, 2010

Undersheriff Matthew Nowicki
Sergeant Trevor Winkel
Deputy Amy Moon
Deputy Sarah Holzschu
Deputy Timothy Hogan
Deputy Justin Holzschu
Deputy Matthew Muladore
Deputy Cody Wheat
Deputy Marcia LaForest
Deputy John Dye

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

v. No. 1:10-cv-1273
HONORABLE
PAUL L. MALONEY

BAY MILLS INDIAN COMMUNITY,
Defendant,

and

LITTLE TRAVERSE BAY BANDS OF
ODAWA INDIANS,
Plaintiff,
No. 1:10-cv-1278
HONORABLE
PAUL L. MALONEY

v.
BAY MILLS INDIAN COMMUNITY,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that the Bay Mills Indian Community hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order granting plaintiff Little Traverse Bay Band [*sic*] of Odawa Indian's [*sic*] motion for preliminary injunction entered in this action on the 29th day of March, 2011.

/s/ Chad P. DePetro
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cc: Opposing counsel Facsimile
Court of Appeals

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,
Plaintiff,

Case No. 1:10-cv-01273-PLM
Case No. 1:10-cv-01278-PLM

v.

Honorable Chief Judge
Paul L. Maloney

AMENDED COMPLAINT

THE BAY MILLS INDIAN COMMUNITY, BAY MILLS INDIAN COMMUNITY TRIBAL GAMING COMMISSION, INDIVIDUAL UNKNOWN MEMBERS OF THE BAY MILLS INDIAN COMMUNITY TRIBAL GAMING COMMISSION in their official capacity, JEFFREY PARKER, CHAIRMAN in his official capacity, TERRY CARRICK, VICE CHAIRMAN, in his official capacity, RICHARD LEBLANC, SECRETARY in his official capacity, JOHN PAUL LUFKINS, TREASURER in his official capacity and BUCKO TEEPLE, COUNCIL PERSON in his official capacity.

Defendants.

AMENDED COMPLAINT

Plaintiff State of Michigan brings the following Amended Complaint for declaratory and injunctive relief, and for an accounting and forfeiture:

JURISDICTION

1. The Court has federal subject matter jurisdiction of this action pursuant to:

a) 28 U.S.C. § 1331, as this Complaint alleges violations of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, and federal common law;

b) 25 U.S.C. § 2710(d)(7)(A)(ii), as Plaintiff is a State which seeks to enjoin gaming activity conducted in violation of a tribal-state compact;

c) 28 U.S.C. § 1367 as this Complaint alleges violations of State anti-gambling and other laws; and

d) 28 U.S.C. § 2201, as this Complaint also seeks a declaratory judgment.

PARTIES

2. Plaintiff is the State of Michigan (State).

3. Defendant Bay Mills Indian Community (Bay Mills) is a federally recognized Indian tribe.

4. Defendant Bay Mills Indian Community Tribal Gaming Commission (Tribal Commission) is a governmental subdivision and arm of Bay Mills

created by Section 4 of the Bay Mills Gaming Ordinance (Gaming Ordinance) (excerpts from most recent version of amended Gaming Ordinance as approved by the National Indian Gaming Commission on September 15, 2010, attached as Exhibit C) to operate for the sole benefit and interest of Bay Mills.

5. Individual unknown Members of the Bay Mills Indian Community Tribal Gaming Commission are officials of Bay Mills appointed by the Bay Mills Executive Council pursuant to the Gaming Ordinance, § 4.11(A) (Tribal Officials). Plaintiff does not know the names of the individuals who have been on the Gaming Commission during times relevant to this action, but will substitute those names as they become known through discovery.

6. Jeffrey Parker is Chairman of the Executive Council for Bay Mills.

7. Terry Carrick is Vice-Chair of the Executive Council for Bay Mills.

8. Richard LeBlanc is Secretary of the Executive Council for Bay Mills.

9. John Paul Lufkins is Treasurer of the Executive Council for Bay Mills.

10. Bucko Teeple is a Council Person on the Executive Council for Bay Mills (Messrs. Parker, Carrick, LeBlanc, Lufkins and Teeple referred to collectively as "Council Members.")

VENUE

11. Defendant Bay Mills has its Tribal offices and reservation in Chippewa County, in the Upper Peninsula of Michigan. Venue is therefore appropriate in this Court pursuant to 28 U.S.C. § 1391(b)(1).

GENERAL ALLEGATIONS

12. On or about August 20, 1993, John Engler, the Governor of the State of Michigan at that time, entered into a tribal-state gaming compact (the "Bay Mills compact") with Bay Mills. A true and correct copy of this compact is attached as Exhibit A.

13. The Bay Mills compact permits Bay Mills to operate casino games, also known as "Class III gaming" (which is defined in IGRA, 25 U.S.C. § 2703(8)), only on "Indian lands" as defined in Section 2(B) of the compact. See Exhibit A.

14. The Gaming Ordinance permits Bay Mills to conduct Class III gaming only on "Indian lands" as defined in Section 2.30 of the Gaming Ordinance. See Exhibit C.

15. The Gaming Ordinance only permits the operation of casinos owned by Bay Mills. Exhibit C, § 5.3(C).

16. Bay Mills created the Tribal Commission when it adopted its Gaming Ordinance which authorizes the Tribal Commission to approve and regulate all casinos operated by Bay Mills.

17. The Tribal Commission has the authority to close Tribally owned casinos that violate federal and/or Tribal law.

18. Since the Bay Mills compact was signed, Bay Mills has conducted Class III gaming in one or more casinos it operates on Indian lands in Chippewa County in the Upper Peninsula.

19. On or about November 3, 2010, ostensibly with the approval of the Tribal Commission, Bay Mills began operating a casino in a renovated building located in or near the village of Vanderbilt (the "Vanderbilt casino") in Otsego County in the Lower Peninsula of Michigan.

20. The Bay Mills Executive Council is authorized to take certain actions on behalf of Bay Mills.

21. The Bay Mills Executive Council, through the Tribal Council Members, made the decision to open and operate the Vanderbilt Casino.

22. The land on which the Vanderbilt casino is being operated is not part of the Bay Mills reservation.

23. The land on which the Vanderbilt casino is being operated was acquired by Bay Mills after October 17, 1988.

24. The land on which the Vanderbilt casino is being operated was not contiguous to the boundaries of the Bay Mills reservation on October 17, 1988.

25. The Vanderbilt casino is approximately 100 miles by road from the Bay Mills reservation.

26. The title to the land on which the Vanderbilt casino is being operated has not been taken into trust by the United States for the benefit of Bay Mills.

27. The land on which the Vanderbilt casino is being operated is not subject to restriction by the United States against alienation.

28. Bay Mills does not exercise governmental power over the land on which the Vanderbilt casino is being operated.

29. After consultations between Bay Mills and the State of Michigan failed to resolve the dispute giving rise to this action, the State sent a letter on December 16, 2010 to Bay Mills demanding that Bay Mills immediately cease the operation of all Class III gaming at the Vanderbilt casino. A true and correct copy of this letter is attached as Exhibit B.

30. Despite this demand, Defendants have refused to cease Class III gaming at the Vanderbilt casino.

31. By entering into the Tribal-State compact, Bay Mills waived its sovereign immunity for purposes of this legal action which seeks injunctive and declaratory relief to remedy violations of the Bay Mills compact and federal law.

32. Bay Mills' sovereign immunity was abrogated by Congress for purposes of this legal action when Congress adopted IGRA.

33. Bay Mills waived any sovereign immunity of the Tribal Commission for actions not in respect of lands within the exterior boundaries of Bay Mills' Reservation when it adopted the Gaming Ordinance, including specifically §§ 4.7 and 4.18(Y).

34. The Tribal Commission and Bay Mills are alter egos, as evidenced in part by Bay Mills' absolute control over the Tribal Commission (see Gaming Ordinance generally); therefore this waiver also extends to Bay Mills.

COUNT I—VIOLATION OF COMPACT SECTION 4(H)

35. Plaintiff incorporates paragraphs 1-34 above as if fully stated in Count I.

36. Section 4(H) of the Bay Mills compact states: "The Tribe shall not conduct any Class III gaming outside of Indian lands."

37. Section 2(B) of the Bay Mills compact defines "Indian lands" to mean: "(1) all lands currently within the limits of the Tribe's Reservation; (2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and (3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United

States against alienation and over which the Tribe exercises governmental power."

38. For the reasons stated in paragraphs 22-28 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Bay Mills compact.

39. The operation of Class III gaming at the Vanderbilt casino therefore violates and is a breach of the Bay Mills compact.

40. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates Tribal laws (see Count II below), the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II below), M.C.L. 432.201 *et seq.* (see Count V below) and federal anti-gambling statutes (18 U.S.C. § 1955), it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

41. There is no adequate remedy at law for this violation by Defendants of the Bay Mills compact which causes the State irreparable injury.

42. IGRA vests this Court with jurisdiction to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact, (2) permanently enjoining Defendants

from permitting and conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT II—VIOLATION OF COMPACT SECTION 4(C)

43. Plaintiff incorporates paragraphs 1-42 above as if fully stated in Count II.

44. Section 4(C) of the Bay Mills compact states:

> The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, *tribal law, IGRA, and all other applicable federal law*. This shall include but not be limited to the licensing of the consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81 and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violation of this Compact, *tribal law, IGRA, or other applicable federal law* shall be corrected immediately by the Tribe. (Emphasis added.)

45. The violation of IGRA, 25 U.S.C. § 2710(d)(1), set forth in Count III below, therefore also violates Section 4(C) of the Bay Mills compact.

46. 18 U.S.C. § 1955 makes it illegal for any person to conduct, finance, manage, supervise or own all or part of an illegal gambling business.

47. An illegal gambling business is defined in 18 U.S.C § 1955 as a gambling business which is a

violation of state law in which it is conducted, involves five or more persons and remains in business for more than 30 days, and grosses more than $2,000 in any single day.

48. Operation of the Vanderbilt casino violates Michigan's anti-gambling statutes, including M.C.L. 750.301 *et seq.* and M.C.L. 432.201 *et seq.*

49. On information and belief, the Vanderbilt casino involves more than five people and grosses more than $2,000 in a single day.

50. Before it was closed by Order of this Court, the Vanderbilt casino was in business more than 30 days.

51. Operation of the Vanderbilt casino therefore violates applicable federal anti-gambling laws, including 18 U.S.C. § 1955, and therefore violates Section 4(C) of the Bay Mills compact.

52. Section 5.5(A) of the Gaming Ordinance restricts operation of any Tribal casino to Indian lands which are defined in Section 2.30 of the Gaming Ordinance to mean: "(A) all lands within the limits of the Reservation of the Bay Mills Indian Community; and (B) all lands title to which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by [the] United States against alienation and over which the Tribe exercises governmental power."

53. Section 5.5(A) of the Gaming Ordinance also restricts operation of any Tribal casino to Indian

lands that comply with Section 20 of IGRA, 25 U.S.C. § 2719.

54. For the reasons stated in paragraphs 22-28 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Gaming Ordinance.

55. For the reasons set forth in paragraph 66 below, the Vanderbilt casino does not comply with the requirements of 25 U.S.C. § 2719.

56. The operation of Class III gaming at the Vanderbilt casino therefore violates the Gaming Ordinance which is Tribal law and therefore violates Section 4(C) of the Bay Mills compact.

57. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates Tribal laws, the laws of the State of Michigan and federal anti-gambling statutes, it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

58. There is no adequate remedy at law for this violation by Bay Mills of its compact which causes the State irreparable injury.

59. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the

gaming at the Vanderbilt casino violates the Bay Mills compact; (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT III—VIOLATION OF IGRA

60. Plaintiff incorporates paragraphs 1-59 above as if fully stated in Count III.

61. Section 2710(d)(1) of IGRA permits Class III gaming only on "Indian lands" as that term is defined in IGRA, and only if conducted "in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) [25 U.S.C. §2710(d)(3)] that is in effect" and only if authorized by a Tribal ordinance that meets the requirements of IGRA [25 U.S.C. § 2710(d)(1)(A)].

62. IGRA defines "Indian lands" to mean: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

63. Based on the facts alleged in paragraphs 22-28 above, the Class III gaming conducted by Bay Mills at the Vanderbilt casino is not being conducted on Indian lands and therefore violates IGRA.

64. The Class III gaming conducted by Defendants at the Vanderbilt casino also violates IGRA because, for the reasons stated in Counts I and II of this Complaint, this gaming is not being conducted "in conformance with" the Bay Mills compact.

65. The Class III gaming conducted by Defendants at the Vanderbilt casino also violates IGRA because, for the reasons stated in Count II of this Complaint, this gaming is not authorized by a duly enacted Tribal ordinance.

66. Finally, Class III gaming is prohibited pursuant to 25 U.S.C. § 2719 on the land on which the Vanderbilt casino is located, even if it is Indian lands, because it was acquired by Bay Mills after October 17, 1988 and does not qualify for any of the exceptions described in 25 U.S.C. § 2719(b).

67. There is no adequate remedy at law for this violation by Defendants of IGRA which causes the State irreparable harm; since the operation of the Vanderbilt casino violates IGRA it cannot be in the public interest and the balance of harm of its continued operation weighs heavily in favor of the State.

68. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay

Mills compact; (2) declaring that the gaming at the Vanderbilt casino violates IGRA; (3) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (4) granting Plaintiff such other relief as the Court deems appropriate.

COUNT IV—VIOLATION OF FEDERAL COMMON LAW

69. Plaintiff incorporates paragraphs 1-68 above as if fully stated in Count IV.

70. As set forth above, because it is not on Indian lands, operation of the Vanderbilt casino violates State anti-gambling laws.

71. The Defendants did not have authority under federal law to approve and operate a casino that does not conform with the requirements of IGRA and that violates State anti-gambling laws.

72. When a Tribe and/or Tribal representatives permit and operate a casino which exceeds the scope of their authority, they violate federal common law governing Indian Tribes.

73. As the Class III gaming conducted at the Vanderbilt casino in violation of federal common law also violates Bay Mills compact (see Counts I and II above), Tribal law (see Count II), the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II), M.C.L. 432.201 *et seq.* (see Count V below), and federal anti-gambling statutes (18 U.S.C. § 1955) (see Count II), it harms the public interest and the balance of harm

caused by this Class III gaming weighs heavily in favor of the State.

74. There is no adequate remedy at law for this violation by Defendants of federal common law which causes the State irreparable injury.

75. Because the licensing and continued operation of the Vanderbilt Casino violated the Gaming Ordinance which requires that licenses be issued only to gaming establishments that are located on Indian lands, Council Members that authorized and operate the casino, and the Tribal Officials that approved the license for the Vanderbilt Casino and allowed its continuing operation exceeded their authority under Tribal law and they are therefore subject to prospective relief Ordered by this Court.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino exceeds the scope of Defendants' authority under federal law; (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT V—VIOLATION OF MICHIGAN GAMING CONTROL AND REVENUE ACT

76. Plaintiff incorporates paragraphs 1-75 above as if fully stated in Count V.

77. M.C.L. 432.220 states in relevant part:

> In addition to other penalties provided for under this act, a person who conducts a gambling operation without first obtaining a license to do so . . . is subject to a civil penalty equal to the amount of gross receipts derived from wagering on the gambling games, whether unauthorized or authorized, conducted on that day as well as confiscation and forfeiture of all gambling game equipment used in the conduct of unauthorized gambling games.

78. Defendants did not first obtain a State-issued license before operating the Vanderbilt casino.

79. On information and belief, Defendants derived gross receipts from wagering at the Vanderbilt casino on some or all of the days it was operated before being closed by Order of this Court, in a total amount that Plaintiff believes is in the range of at least hundreds of thousands of dollars.

80. Gambling game equipment was used in the conduct of unauthorized gambling games at the Vanderbilt casino.

81. The violation of M.C.L. 432.220 subjects the above-described gross receipts and gambling game equipment to forfeiture.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order requiring (1) an accounting and forfeiture of all gross receipts obtained and gambling game equipment used by Defendants in violation of M.C.L. 432.220 and (2)

granting Plaintiff such other relief as the Court deems appropriate.

COUNT VI—NUISANCE

82. Plaintiff incorporates paragraphs 1-81 above as if fully stated in Count VI.

83. As set forth above, any continued operation of the Vanderbilt casino is proscribed by law.

84. Any continued operation of the Vanderbilt casino would therefore be a public nuisance.

85. Defendants do not have authority to operate the Vanderbilt casino.

86. Any continued operation of the Vanderbilt casino harms the public interest and the balance of harm caused by such operation weighs heavily in favor of the State.

87. There is no adequate remedy at law for the continued operation of the Vanderbilt casino which causes the State irreparable injury.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino is a public nuisance, (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

Plaintiff further requests that it be awarded its costs and attorney fees incurred in bringing this action.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Louis B. Reinwasser

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Dated: July 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically filed the foregoing document with the Clerk of the court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States

Postal Service the same to any non-ECF participants.

/s/ Louis B. Reinwasser

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PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 30 2013
OFFICE OF THE CLERK

No. 12-515

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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Library of Congress
Law Library

QUESTIONS PRESENTED

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA), authorizes an Indian tribe to conduct class III gaming under limited circumstances and only on "Indian lands." 25 U.S.C. § 2710(d)(1). This dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino located *off* of "Indian lands" (i.e., on sovereign *state* lands) and presents two questions:

1. Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands.

2. Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the State of Michigan. Respondent is the Bay Mills Indian Community, a federally recognized Indian tribe. Appellee below but not appearing here is the Little Traverse Bay Bands of Odawa Indians, a federally recognized Indian tribe that brought an action seeking to enjoin Respondent's off-reservation gaming activities.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceeding ii
Table of Contents iii
Table of Authorities v
Opinions Below 1
Jurisdiction 1
Statutory Provisions Involved 1
Introduction 2
Statement of the Case 3
A. The nature of tribal sovereign immunity 3
B. The Indian Gaming Regulatory Act 4
C. *Kiowa* 7
D. The explosion of tribal gaming 9
E. The State's historic role in regulation of gaming 11
F. Bay Mills' Vanderbilt casino 12
G. Proceedings below 13
H. Proliferation of the *Bay Mills* decision 15
Summary of Argument 17
Argument 20
I. This lawsuit satisfies 25 U.S.C. § 2710. 20
II. Alternatively, states are entitled to federal-court injunctions even when illegal tribal casinos are off reservation. 22

A. The federal courts have jurisdiction under 28 U.S.C. § 1331 for alleged IGRA violations. 22

B. Bay Mills does not have sovereign immunity from a state suit seeking to enjoin the Tribe's illegal gaming on lands subject to Michigan jurisdiction. 25

1. IGRA abrogates tribes' sovereign immunity for illegal gaming activity on sovereign state lands. 25

a. Congressional intent 25

b. *Seminole*'s holistic approach 28

c. Comparison to foreign immunity ... 33

2. Alternatively, the Court should confirm that tribes do not have sovereign immunity with respect to illegal commercial activity on lands under state jurisdiction. 36

Conclusion 42

TABLE OF AUTHORITIES

Page

Cases

C & L Enterprises, Inc. v. *Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) 8, 37

Cabazon Band of Mission Indians v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997) 23

California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) 4, 6, 18, 27

College Sav. Bank v. *Florida Prepaidpostsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999) 41

Florida v. *Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999) 35

Free Enterprise Fund v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010) 19, 23

Girouard v. *United States*, 328 U.S. 61 (1946) 39

Jaffee v. *Redmond*, 518 U.S. 1 (1996) 9

Kiowa Tribe v. *Mfg. Techs.*, 523 U.S. 751 (1998) ..... passim

Lewis v. *Norton*, 424 F.3d 959 (9th Cir. 2005) 35

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. *Patchak*, __ U.S. __; 132 S. Ct. 2199 (2012) 5

Merrell Dow Pharm. Inc. v. *Thompson*,
478 U.S. 804 (1986) 24

Mescalero Apache Tribe v. *New Mexico*,
131 F.3d 1379 (10th Cir. 1997) 24, 35

Mohamad v. *Palestinian Auth.*,
132 S. Ct. 1702 (2012) 32

Oklahoma v. *Tiger Hobia*,
2012 U.S. Dist. LEXIS 100793 (N.D. Ok.
2012)..... 16

Pueblo of Santa Ana v. *Kelly*,
104 F.3d 1546 (10th Cir. 1997) 18, 24

Republic of Argentina v. *Weltover, Inc.*,
504 U.S. 607 (1992) 34, 35

Republic of Austria v. *Altmann*,
541 U.S. 677 (2004) 33, 34, 35

Santa Clara Pueblo v. *Martinez*,
436 U.S. 49 (1978) 3, 30

Seminole Tribe v. *Florida*,
517 U.S. 44 (1996) ..... passim

State of Alabama v. *PCI Gaming Authority, et al.*,
U.S. Dist. Ct. M.D. Ala. No. 2:13-cv-00178-
WKW-WC..... 17

State of Michigan v. *Sault Ste. Marie Tribe of Chippewa Indians, et al.*,
U.S. Dist. Ct. W.D. Mich. No. 1:12-CV-962 16

Tucson Airport Auth. v. *General Dynamics Corp.*,
136 F.3d 641 (9th Cir. 1998) 32

Turner v. *United States*,
248 U.S. 354 (1919) 3

U.S. Fire Ins. Co. v. *United States*,
806 F.2d 1529 (11th Cir. 1986) 32

United States v. *Jicarilla Apache Nation*,
__ U.S. __; 131 S. Ct. 2313 (2011) 3, 31

United States v. *United States Fidelity & Guaranty Co.*,
309 U.S. 506 (1940) 3

Wisconsin v. *Ho-Chunk Nation*,
512 F.3d 921 (7th Cir. 2008) 35

Zuber v. *Allen*,
396 U.S. 168 (1969) 39

Statutes

18 U.S.C. § 1166 ..... 17, 25, 26, 32

18 U.S.C. § 1166(a) 6

18 U.S.C. § 1166(d) 6

25 U.S.C. § 2701 27

25 U.S.C. § 2701 *et seq* ..... passim

25 U.S.C. § 2702(2) 12

25 U.S.C. § 2703(4) 18, 21

25 U.S.C. § 2703(6) 5

25 U.S.C. § 2703(7) 5

25 U.S.C. § 2703(8) 5

25 U.S.C. § 2710 ..... passim

25 U.S.C. § 2710(a)(1) 5

25 U.S.C. § 2710(d)(1) i

25 U.S.C. § 2710(d)(1)(C) 6

25 U.S.C. § 2710(d)(3)(C) 6, 35
25 U.S.C. § 2710(d)(7)(A)(i) 28, 29
25 U.S.C. § 2710(d)(7)(A)(ii) ..... passim
25 U.S.C. § 2719(a) 5
26 U.S.C. § 2704 28
26 U.S.C. § 2706 28
26 U.S.C. § 2711 28
26 U.S.C. § 2713 28
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 ..... passim
28 U.S.C. § 1367 13
28 U.S.C. § 1602 *et seq.* 33, 34, 40, 41
28 U.S.C. § 1603(d) 41
28 U.S.C. § 2201 13

Other Authorities

Const. and Bylaws of the Bay Mills Indian Community, Art. II, § 1 21

Earl L. Grinols & David B. Mustard, *Casinos, Crime, and Community Costs*, 88 Rev. Econ. & Stat. 28 (2006) 5, 12

H.R. Rep. No. 99-488 (1986) 10

Constitutional Provisions

U.S. Const. amend XI 29, 30, 31, 41

U.S. Const. amend. X 31

OPINIONS BELOW

The opinion of the Sixth Circuit court of appeals, Pet. App. 1a–18a, is reported at 695 F.3d 406 (6th Cir. 2012). The opinion of the district court, Pet. App. 19a–39a, is not reported.

JURISDICTION

The judgment of the Sixth Circuit was entered on August 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

25 U.S.C. § 2710(d)(7)(A)(ii):

> (7)(A) The United States district courts shall have jurisdiction over—
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect . . . .

INTRODUCTION

In October 2010, Bay Mills Indian Community opened a casino some 100 miles from the Tribe's reservation. The federal government has determined that the casino is *not* located on "Indian lands" as defined by IGRA, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* Thus, the property is subject to Michigan's sovereign authority, and the casino is illegal under both Michigan and federal law. The district court preliminarily enjoined the casino. Bay Mills appealed, and the Sixth Circuit reversed.

Bay Mills concedes Michigan could enjoin an illegal casino on Indian lands but says Michigan cannot enjoin the same casino on sovereign state lands. According to Bay Mills' topsy-turvy view, IGRA created federal-court jurisdiction and abrogated tribal immunity for Indian-land suits only, leaving states to their own devices when tribes engage in illegal gaming on lands under state jurisdiction.

Bay Mills is wrong. To begin, the Tribe admits it licensed and supervised the illegal casino, and it has not denied that these activities occurred *from the Tribe's reservation.* These facts alone create federal-court jurisdiction and abrogate tribal immunity under IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii).

In any event, Michigan's allegations that Bay Mills is violating IGRA raise federal questions that fall comfortably within 28 U.S.C. § 1331's broad grant of federal-court jurisdiction. And this Court has never expressly held that tribal immunity extends to illegal, off-reservation, commercial conduct. Accordingly, the Sixth Circuit should be reversed.

STATEMENT OF THE CASE

A. The nature of tribal sovereign immunity

Indian tribes have no rights under the United States Constitution to any attributes of sovereignty. Congress therefore has plenary authority to prescribe the limits of—or eliminate entirely—tribal powers of local self-government. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). So tribes have no federal constitutional right to sovereign immunity from suit. *United States* v. *Jicarilla Apache Nation*, __ U.S. __; 131 S. Ct. 2313, 2323 (2011). As a result, Congress has the authority to override the judicially created doctrine of tribal sovereign immunity.

The tribal-immunity doctrine developed "almost by accident." *Kiowa Tribe* v. *Mfg. Techs.*, 523 U.S. 751, 756 (1998). The doctrine's oft-cited source, *Turner* v. *United States*, 248 U.S. 354 (1919), "simply does not stand for that proposition." *Kiowa*, 523 U.S. at 756. *Turner* is "at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine." *Id.* at 757. And though the doctrine is now part of this Court's settled precedent, e.g., *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (citing *Turner*), this Court has expressed skepticism about the wisdom of applying it to commercial activity:

> At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is

> needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims. [*Kiowa*, 523 U.S. at 758 (citations omitted).]

Before this Court's 1998 decision in *Kiowa*, discussed in more detail below, the Court's precedent sustained tribal immunity "without drawing a distinction based on where the tribal activities occurred," or drawing "a distinction between governmental and commercial activities of a tribe." *Kiowa*, 523 U.S. at 754–55 (numerous citations omitted). And while the Court treated tribal sovereign immunity as settled law, none of its decisions had "applied the doctrine to purely off-reservation conduct." *Id.* at 764 (Stevens, J., dissenting). Against this backdrop, Congress adopted IGRA in 1988.

B. The Indian Gaming Regulatory Act

In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court confirmed that states could not regulate gaming activities that occur *in Indian country*. Only one year later, Congress responded by passing IGRA to "provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 48 (1996).

IGRA allows tribes to conduct gaming only on "Indian lands," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, __ U.S. __; 132 S. Ct. 2199, 2203 (2012), and only certain Indian lands are eligible for gaming. "After–acquired" or "newly acquired" Indian lands—those lands taken in trust for the benefit of the tribe after the date IGRA was enacted—are ineligible for tribal gaming unless they satisfy an enumerated statutory exception. 25 U.S.C. § 2719(a).

Jurisdiction over tribal gaming is allocated based on the "class" of gaming involved. There are three classes: class I (traditional forms of tribal gaming), class II (bingo and certain card games) and class III (all other gaming not class I or II). 25 U.S.C. § 2703(6), (7) & (8). Class I gaming is the only type of gaming "within the exclusive jurisdiction of the Indian tribes." 25 U.S.C. § 2710(a)(1). Conversely, class III gaming, which includes high-stakes, Vegas-style casino gaming, is the most heavily regulated. *Seminole Tribe*, 517 U.S. at 48–49. This heavy regulation is appropriate because the opening of casinos has been linked to an increase in crime[1] and problem gambling.[2] Thus, class III gaming is subject to regulatory controls beyond those a tribe imposes.

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[1] Earl L. Grinols & David B. Mustard, *Casinos, Crime, and Community Costs*, 88 Rev. Econ. & Stat. 28 (2006).

[2] Dean Gerstein et al., Nat'l Opinion Research Ctr. at the Univ. of Chi., *Gambling Impact and Behavior Study: Report to the National Gambling Impact Study Commission* (Apr. 1, 1999), available at: http://www.norc.org/PDFs/Publications/GIBSFinalReportApril1999.pdf.

The most significant regulatory barrier for Class III gaming (the gaming at issue here) is the tribal-state gaming compact. In a state like Michigan that has authorized only limited casino gaming, a tribe may conduct class III gaming on Indian lands only with the state's permission through a compact. 25 U.S.C. § 2710(d)(1)(C); *Seminole Tribe*, 517 U.S. at 47. Gaming compacts address any number of issues, including the allocation of state and tribal civil and criminal jurisdiction over class III gaming activities, reimbursement to the state of associated regulatory costs, standards for the operation of gaming facilities, and other related matters. 25 U.S.C. § 2710(d)(3)(C).

IGRA also assimilates all state laws pertaining to the licensing, regulation, or prohibition of gambling and makes them applicable "in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a). Although IGRA reserves to the United States exclusive authority over criminal prosecutions for violations of these assimilated state laws, 18 U.S.C. § 1166(d), states and the federal government have concurrent authority to pursue civil claims.

When Congress enacted IGRA in 1988, there was no reason to believe that tribal sovereign immunity extended to off-reservation, commercial activity. Moreover, *Cabazon* had made it clear that states could not regulate gaming that occurred *in* Indian country. Unsurprisingly, then, IGRA targets illegal gaming activity *on* Indian lands when it nominally grants federal-court jurisdiction and abrogates tribal immunity for a state seeking to enjoin the activity:

> (7)(A) The United States district courts shall have jurisdiction over—
>
> > (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity *located on Indian lands* and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect . . . . [25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added).]

In other words, the problem of illegal gaming was so grave that Congress authorized state suits against tribes *even for on-reservation gaming*. There was no need to address off-reservation gaming, because tribes presumably lacked immunity off reservation.

C. *Kiowa*

Ten years after IGRA's enactment, this Court issued its opinion in *Kiowa*. The Kiowa Tribe is federally recognized and has land holdings in Oklahoma. 523 U.S. at 753. The Tribe's economic development corporation agreed to purchase stock from a non-tribal company, and the chairman of the Tribe's business committee signed a $285,000 promissory note in the Tribe's name. *Id.* The parties disputed where the note was signed; the Tribe claimed execution on trust land, the creditor claimed execution off reservation. *Id.* at 753–54. The Tribe defaulted on the note, the creditor sued, and the Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit. *Id.* at 754. In sustaining the Tribe's position, the Court's immunity holding was arguably limited to suits involving tribal contracts:

> Tribes enjoy immunity from suits *on contracts*, whether those contracts involved governmental or commercial activities and whether they were made on or off a reservation. [*Id.* at 760 (emphasis added).]

Later, this Court again characterized its *Kiowa* decision in terms of contract: "Tribal immunity, we ruled in *Kiowa*, extends to suits on *off-reservation commercial contracts*." *C & L Enterprises, Inc.* v. *Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (emphasis added).

In the context of its facts, the *Kiowa* holding makes perfect sense. The *locus* of a commercial contract can be elusive. Was the Kiowa Tribe's conduct on reservation because that was where payments were supposed to originate? Was it *off* reservation because that was where payments were supposed to be made? Was it on- or off-reservation based on the disputed question of where the contract was signed? The Court reasonably rejected these unruly factors as grounds for determining whether tribal immunity exists.

No such concerns arise here. The present case alleges conduct—the operation of a brick-and-mortar casino—that is indisputably off-reservation, i.e., on lands subject to state jurisdiction.

D. The explosion of tribal gaming

Since tribal immunity is judge-made law, it is subject to evolutionary changes like any other common law, based on reason and experience. *Jaffee* v. *Redmond*, 518 U.S. 1, 8 (1996). Courts may influence the development of tribal immunity directly by altering the scope of that immunity, or indirectly through the interpretation of statutes that abrogate or otherwise impact tribal immunity.

In *Kiowa*, this Court voiced considerable skepticism about "the wisdom of perpetuating" tribal immunity at all. 523 U.S. at 758. But rather than taking immediate action, the Court stayed its hand and gave Congress an opportunity to act. "The capacity of the Legislative Branch to address this issue by comprehensive legislation counsels some caution by us in this area. . . . [W]e decline to revisit our case law and choose to defer to Congress." *Id.* at 759–60.

In the 15 years since *Kiowa*, Congress has not acted to address the problems created by blanket tribal immunity. Meanwhile, the growth in tribal commercial enterprises—gaming in particular—has been exponential. In 1998, combined tribal gaming revenues were $8.5 billion.[3] In 2011, the revenues had tripled, to $27.2 billion.[4] That amount exceeds

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[3] National Indian Gaming Commission gaming revenue report viewable at:
http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/19962006revenues.pdf (last accessed July 17, 2013).

[4] National Indian Gaming Commission gaming revenue report viewable at:

the GDP of more than 70 countries[5] and approaches that of the private U.S. commercial gaming sector.[6] There is no reason to believe that this growth trend will reverse any time soon.

The number of tribal gaming establishments has also increased dramatically. In 1986—two years before IGRA's passage—only 80 gaming operations existed, mostly simple bingo halls. H.R. Rep. No. 99-488, at 9 (1986). In 2011, 240 tribes were operating approximately 460 gaming facilities.[7]

Blanket tribal immunity is not a boon to all tribes, as this case shows. Soon after Michigan filed its complaint seeking to enjoin operation of the Vanderbilt casino, the Little Traverse Bay Bands of Odawa Indians filed a similar lawsuit, also seeking an injunction. According to the Little Traverse Bay Tribe, the Vanderbilt casino posed a competitive threat to the casino that the Little Traverse Bay Tribe operated on its reservation less than 40 miles away. 12/23/10 Little Traverse Bay Tribe Br. in Support of Mot. for Prelim. Inj., Case 1:10-cv-01273-PLM, at 7.

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http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/GrowthinIndianGamingGraph20022011.pdf (last accessed July 17, 2013).

[5] http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(PPP).

[6] The American Gaming Association reported that commercial gaming revenues in 2011 were $34.6 billion: http://www.americangaming.org/industry-resources/research/fact-sheets/gaming-revenue-10-year-trends (last accessed July 17, 2013).

[7] National Indian Gaming Commission, *Gaming Tribe Report*, viewable at: http://www.nigc.gov/LinkClick.aspx?fileticket=0J7Yk1QNgX0%3d&tabid=943 (last accessed July 17, 2013).

Despite Bay Mills' illegal competition, the Little Traverse Bay Tribe's action was dismissed with prejudice by the Sixth Circuit based on that court's view of tribal immunity. If Bay Mills is allowed to break the law by opening casinos outside Indian lands, tribes that follow the law will be unfairly disadvantaged by illegal, competing casinos, or even encouraged to engage in the same unlawful behavior.

E. The State's historic role in regulation of gaming

Gaming is a unique industry imbued with social, economic, and moral implications. Americans' opinions towards gambling are reflected in the laws prohibiting, legalizing, and regulating gaming enterprises. For most of the 20th century, Nevada was the only state that allowed casino-style gambling, and it is still the only state that allows it statewide. In 1978, New Jersey passed a law authorizing casinos in Atlantic City, and since then, other states have allowed limited casino gambling restricted to specific locations (e.g., Michigan voters approved an initiative in 1996 that allowed three commercial casinos in Detroit). As a general matter, casino gaming at the state level is still either generally prohibited or tightly regulated.

States remain wary of casinos for good reason. A comprehensive report prepared for the National Gambling Impact Study Commission concluded that the opening of casinos has negative economic and social impacts.[8] Using criteria developed by the American Psychiatric Association, the authors

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[8] See Gerstein et al., *Gambling Impact and Behavior Study*.

estimated that 2.5 million adults are pathological gamblers and another 3 million adults are considered problem gamblers.[9] The toll such gamblers have on their community, and on the general public, is significant. They are more likely to have been on welfare, declared bankruptcy, and been arrested or incarcerated. Moreover, the study shows that the availability of a casino within 50 miles (versus 50 to 250 miles) nearly doubles the prevalence of problem and pathological gamblers.[10]

Crime associated with casinos has also been a concern of the states. Congress recognized the attraction to organized crime that casinos present when it adopted IGRA. 25 U.S.C. § 2702(2).

Casinos have also been linked to an increase in crime in general. Possibly the most comprehensive study on the topic covered all 3,165 United States counties and analyzed FBI Uniform Crime Reports from 1977 to 1996.[11] The authors concluded that casinos increased all but one of seven FBI Index I crimes. *Id.* at 44.

F. Bay Mills' Vanderbilt casino

Bay Mills is a federally recognized Indian tribe with a reservation in Michigan's Upper Peninsula in Chippewa County, near the town of Brimley. Pet. App. 3a. The Tribe's offices are located on the reservation.

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[9] *Id.* at viii.

[10] *Id.* at ix.

[11] See Grinols et al., *Casinos, Crime, and Community Costs*, 88 Rev. Econ. & Stat. at 29.

In 1993, Bay Mills entered into a tribal-state compact with Michigan—a compact governed by IGRA—and thereafter has continuously operated at least one casino on its reservation. As IGRA requires, Bay Mills also adopted a gaming ordinance that the National Indian Gaming Commission approved. Pet. App. 4a. The ordinance created a tribal gaming commission charged with regulating all casinos the Tribe owned, including issuing licenses to those casinos. Pet. App. 15a. Both the compact and the gaming ordinance prohibited the Tribe from operating a casino outside of Indian lands. Pet. App. 5a, 15a.

On October 29, 2010, the tribal gaming commission issued a license to the Tribe to open a new, off-reservation casino on property the Tribe owned near Vanderbilt, Michigan, approximately 100 miles from its reservation. The Tribe opened the casino on November 3, 2010, even though it had not obtained confirmation from either the United States Department of the Interior or the National Indian Gaming Commission that the Vanderbilt property was eligible for casino gaming.

G. Proceedings below

On December 16, 2010, Michigan's Attorney General sent a letter to Bay Mills ordering it to immediately close the Vanderbilt casino because it violated state and federal gaming laws. Bay Mills refused, so the State filed this lawsuit seeking to enjoin any further operation of the casino. The State alleged that the court had jurisdiction under 28 U.S.C. § 1331, federal common law, 25 U.S.C. § 2701 *et seq.*, 25 U.S.C. § 2710(d)(7)(A)(ii), 28 U.S.C. § 1367, and 28 U.S.C. § 2201.

A short time later, the Little Traverse Bay Tribe filed its own lawsuit against Bay Mills, seeking an injunction against further operation of the Vanderbilt casino. The district court consolidated the two lawsuits.

Within hours of these filings, both the Department of the Interior and the National Indian Gaming Commission issued letters formally determining that the Vanderbilt casino was *not* located on Indian lands as defined by IGRA. Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to Michael Gross, Associate General Counsel, National Indian Gaming Commission (Dec. 21, 2010), J.A. 69; Memorandum from Michael Gross (Dec. 21, 2010), J.A. 102. On March 29, 2011, the district court filed a 20-page opinion and order that preliminarily enjoined Bay Mills' operation of the casino. Pet. App. 19a–39a.

The district court began by addressing its jurisdiction. Although § 2710(d)(7)(A)(ii) authorizes a district court to enjoin class III gaming activity "located on Indian land" (and in violation of a compact), the district court recognized its broad subject-matter jurisdiction under 28 U.S.C. § 1331 to resolve *any* civil action arising under federal law. Pet. App. 25a. Though not dispositive, the district court also noted that Bay Mills had, in 1999, successfully made the exact same § 2710 request for injunctive relief against another tribe. Pet. App. 26a. Concluding the relevant property was not "Indian land" as a matter of federal law, Pet. App. 29a, the court preliminarily enjoined Bay Mills' operation of its Vanderbilt casino. Pet. App. 39a.

Bay Mills appealed, and the Sixth Circuit vacated the injunction, ruling that the federal courts lacked jurisdiction to enjoin Bay Mills from illegal gaming outside Indian lands, and that Bay Mills had sovereign immunity from the State's common-law and other statutory claims.

With respect to jurisdiction, the Sixth Circuit declined to apply § 1331 to Michigan's IGRA claims. Rather, the court looked solely to § 2710 and concluded that the provision did not apply because Michigan alleged that illegal gaming was taking place off reservation, not *on* Indian lands, as § 2710's language contemplated. Pet. App. 9a. And, consistent with the narrow scope it ascribed to § 2710, the Sixth Circuit also concluded that Bay Mills was protected by sovereign immunity. Pet. App. 13a.

The net result of the Sixth Circuit's approach is that states may sue in federal court to enjoin a tribe's illegal operation of a casino on Indian lands. But states must resort to much more intrusive individual civil actions and criminal prosecutions to stop a tribe's illegal operation of a casino on lands under state jurisdiction. Suing tribal officials and sending in law-enforcement officials to seize equipment and arrest tribal employees is the type of inter-sovereign friction that IGRA is supposed to avoid.

H. Proliferation of the *Bay Mills* decision

Michigan is already aware of at least three additional lawsuits where parties have cited the Sixth Circuit's decision here in support of a tribe's operation (or planned operation) of a casino in violation of IGRA or tribal-state gaming compacts.

One such case involves the Sault Ste. Marie Tribe of Chippewa Indians, which, like Bay Mills, is a tribe whose reservation is entirely in Michigan's Upper Peninsula. *State of Michigan* v. *Sault Ste. Marie Tribe of Chippewa Indians, et al.*, U.S. Dist. Ct. W.D. Mich. No. 1:12-CV-962. The Sault Tribe is seeking to obtain Indian lands status for off-reservation property it purchased hundreds of miles away in the Lower Peninsula where it intends to operate a casino. The Tribe relies on the Sixth Circuit decision in this case for the proposition that, because the land has not been taken into trust (though the Sault Tribe intends to seek such status) and is not yet Indian lands, it cannot be sued in federal court.

Similarly, in *Oklahoma* v. *Tiger Hobia*, 2012 U.S. Dist. LEXIS 100793 (N.D. Ok. 2012), the district court entered a preliminary injunction prohibiting the defendants Kialegee Tribal Town, a federally chartered corporation, and certain tribal officials from proceeding with the development of a casino on lands which the National Indian Gaming Commission had determined were not Indian lands under IGRA. The defendants appealed, citing the *Bay Mills* decision in support of their argument that the court did not have subject-matter jurisdiction, and that the defendants' sovereign immunity had not been abrogated because the lawsuit sought to prohibit gaming on lands that the State of Oklahoma had alleged were not Indian lands. Michigan has filed an *amicus* brief in support of Oklahoma's position that the court has jurisdiction and defendants' sovereign immunity has been abrogated.

Finally, in *State of Alabama* v. *PCI Gaming Authority, et al.*, U.S. Dist. Ct. M.D. Ala. No. 2:13-cv-00178-WKW-WC, the State of Alabama has sued a tribal gaming authority and its officials to enjoin operation of casino-style gaming that is prohibited under state law and is not authorized by any gaming compact. Alabama brought a claim under IGRA, specifically 18 U.S.C. § 1166 (which assimilates state anti-gambling laws into federal law). In an *amicus* brief supporting the tribal defendants, the United States relied on the *Bay Mills* decision to support its assertion that IGRA does not abrogate tribal sovereign immunity, even for claims under state law assimilated by § 1166. Michigan filed an *amicus* brief in support of Alabama's position that Congress intended to allow states to pursue civil claims under state anti-gambling laws in federal court, and that IGRA provided an abrogation of tribal sovereign immunity for that purpose.

These suits are just the tip of the proverbial iceberg. As tribes continue to look for better casino locations (as in Michigan and Oklahoma) or new ways to profit from the explosion of casino gaming (as in Alabama), the friction between state authority and tribal immunity will inevitably increase.

SUMMARY OF ARGUMENT

The Sixth Circuit erred in two ways when it held that Michigan could enjoin an illegal tribal casino located on Indian lands but not on lands subject to the State's own sovereign jurisdiction.

To begin, the Tribe authorized, licensed, and operated the Vanderbilt casino from the Tribe's reservation near Brimley, Michigan. By definition, the reservation constitutes "Indian lands." 25 U.S.C. § 2703(4). Because the Tribe's authorization, licensing, and operation of the casino from Indian lands are all "activities" necessary for the casino's existence, this lawsuit fulfills all of § 2710's prerequisites for suit, even as the Sixth Circuit identified them. Pet. App. 7a (citing 25 U.S.C. § 2710(d)(7)(A)(ii) and holding that federal district courts have jurisdiction over any cause of action where "(1) the plaintiff is a State or an Indian tribe; (2) the cause of the action seeks to enjoin a class III gaming *activity*; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.") (emphasis added).

Moreover, this suit should proceed even if one ignores the on-reservation conduct that is necessary to gaming in Vanderbilt. The federal courts have jurisdiction over this matter because the State's complaint alleged violations of IGRA, a federal statute. 28 U.S.C. § 1331; *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050, 1056 (9th Cir 1997) (a "claim to enforce the Compacts arises under federal law and thus [ ] we have jurisdiction pursuant to 28 U.S.C. § 1331."); *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court.").

Section 1331's expansive federal-question jurisdiction is restricted only when Congress "expressly limit[s]" it through a statute creating limited federal-court jurisdiction. *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010). And IGRA contains no such limiting language.

Tribal sovereign immunity also does not bar this action, for two separate reasons. First, in *Seminole Tribe*, this Court endorsed a more holistic approach to analyzing statutory abrogation of sovereign immunity, an approach that considers the statutory scheme as a whole. 517 U.S. at 57. When examining IGRA as a whole (i.e., not focusing exclusively on § 2710), it is immediately apparent that Congress understood and expected that a state could enforce its gaming laws in federal court against a tribe engaged in off-reservation gaming. It cannot be the case that Congress intended in IGRA to allow a state the least provocative remedy (a federal-court injunction) to stop illegal tribal gaming on Indians lands, while prohibiting injunctions of the exact same illegal conduct on sovereign state lands, thus forcing a state to send in police to seize and arrest.

In the alternative, the Court should confirm that tribes have no sovereign immunity from suits alleging illegal commercial gaming occurring on state lands. Aside from *Kiowa*'s commercial-paper context, this Court has never expressly held that tribal immunity applies to illegal, off-reservation, commercial conduct. *Kiowa*, 523 U.S. at 764 ("in none of our cases have we applied to doctrine to purely off-reservation conduct.") (Stevens, J., dissenting).

Given the tribal-immunity doctrine's dubious foundation, the Court should hesitate to extend the doctrine now that the question is squarely presented. There is no good reason a tribe should enjoy broader immunity than the federal government and foreign nations, entities which are undeniably subject to suit for their commercial activities.

ARGUMENT

I. This lawsuit satisfies 25 U.S.C. § 2710.

Section 2710(d)(7)(A)(ii) says the United States district courts have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." Bay Mills has not disputed that § 2710 both vests jurisdiction in federal courts and abrogates tribal sovereign immunity when the provision's requirements are satisfied. Instead, Bay Mills contends Michigan's lawsuit does not satisfy § 2710 because the illegal conduct is not "located on Indian lands."

But Bay Mills admitted that it's Executive Council "made the decision to own and operate the Vanderbilt casino," Pet. App. 59a, ¶ 21; Pet. App. 43a, ¶ 21, and that this action was taken "with the approval of the Tribal [Gaming] Commission," Pet. App. 59a, ¶19; Pet. App. 43a, ¶ 19. In other words, the Tribe authorized, licensed, and operated the Vanderbilt casino. These facts are dispositive of the § 2710 issue.

The Tribe, through its Executive Council, derives its governmental authority from its reservation. Const. and Bylaws of the Bay Mills Indian Community, Art. II, § 1 ("The jurisdiction of the Bay Mills Indian Community shall extend to all territory within the original confines of the Bay Mills Reservation . . . and to such other land . . . as may be added thereto . . . .").[12] By definition, a tribe's reservation is "Indian land." 25 U.S.C. § 2703(4). As a result, Bay Mills' authorizing, licensing, and operation of the Vanderbilt casino necessarily occurred "on Indian lands," satisfying § 2710 even under the Sixth Circuit's analysis. Accordingly, this Court should reverse the Sixth Circuit and reinstate the preliminary injunction.

Such a conclusion is consistent with IGRA's language and congressional intent. Congress did not limit federal-court authority to enjoining just the gaming itself. Section 2710(d)(7)(A)(ii) specifically says that a court can enjoin all unlawful "class III gaming *activity*." (Emphasis added.) Authorizing, licensing, and operating a class III gaming facility are undeniably "class III gaming activities" for purposes of the statute. Thus, these activities provide a natural basis for a federal court to exercise jurisdiction and enter an injunction. And without authorization, licensure, and operation, the associated casino, regardless of where it is located, must close.

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[12] http://www.baymills.org/tribal-constitution.php.

Shielding such decisions from federal-court review would thwart Congress's clear intent to provide federal-court jurisdiction over state or tribal lawsuits asserting violations of tribal-state gaming compacts. And doing so would violate § 2710's plain language, including the expansive meaning of the term "activity."[13]

II. Alternatively, states are entitled to federal-court injunctions even when illegal tribal casinos are off reservation.

A. The federal courts have jurisdiction under 28 U.S.C. § 1331 for alleged IGRA violations.

In its complaint, the State asserted that the district court had jurisdiction pursuant to "28 U.S.C. § 1331, as this Complaint alleges violations of [IGRA] and federal common law." Pet. App. 56a. Section 1331 unambiguously provides federal court jurisdiction over "*all* civil actions arising under the Constitution, laws, or treaties of the United States." (Emphasis added.) Michigan's complaint alleges violations of IGRA, a federal law. Accordingly, federal courts have jurisdiction under § 1331.

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[13] At the petition stage, the Solicitor General asserted in his brief opposing the petition that the argument set forth above is "not properly before this Court" because the underlying facts were not alleged until the amended complaint, which post-dated the appeal. U.S. Br. 17 n.4. But Bay Mills has already admitted those facts. Pet. App. 43a, ¶ 21; Pet. App. 43a, ¶ 19. And the Tribe waived any procedural objections by failing to raise them in its brief opposing Michigan's petition for certiorari. Sup. Ct. R. 15.2; *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2610 (2010).

There is nothing in § 2710's plain language that suggests Congress intended to oust federal courts of their § 1331 jurisdiction over illegal tribal casinos simply because the casinos are located off reservation. This Court has made clear that in the absence of statutory text that "expressly limit[s] the jurisdiction that other statutes confer on district courts," plaintiffs remain free to invoke other jurisdictional statutes, such as § 1331. *Free Enterprise Fund*, 130 S. Ct. at 3150. Section 2710 does not purport to remove this federal-question jurisdiction.

Both the Ninth and Tenth Circuits have reached the result for which Michigan advocates here. In *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997), several Tribes sued California to force the State to remit amounts it had collected as license fees from horse racing associations that had received payments pursuant to an off-track betting regime established in a compact between the State and the Tribes. That compact included a provision obligating the State to turn the money over to the Tribes if a federal court determined that the payments were illegal. A court made that determination, but the State refused to remit the money to the Tribes, who then sued.

California argued that the federal courts did not have jurisdiction because § 2710(d)(7)(A)(i–iii) conferred jurisdiction in only limited circumstances, and the Tribes' lawsuit did not satisfy the statutory prerequisites. The Ninth Circuit rejected California's position. 124 F.3d at 1056. Noting "the importance of the federal issue in federal-question jurisdiction" under § 1331, *id.* (quoting *Merrell Dow Pharm. Inc.*

v. *Thompson*, 478 U.S. 804, 814 n.12 (1986)), the Ninth Circuit agreed with the Tribes that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Id.*

Similarly, in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997), New Mexico brought a § 2710(d)(7)(a)(ii) counterclaim alleging that the tribal-state compact at issue was invalid because New Mexico's governor did not have authority to sign it. The Mescalero Apache Tribe argued that the federal court lacked jurisdiction because § 2710 applies only when a tribe allegedly violates a compact that is "in effect."

Relying on *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997), the Tenth Circuit concluded that it had jurisdiction to answer the question of compact validity. *Mescalero*, 131 F.3d at 1386. And the Tenth Circuit's reasoning in *Pueblo* applies equally here: "IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court." *Pueblo of Santa Ana*, 104 F.3d at 1557.[14]

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[14] Even the United States does not appear to disagree with this point. In the Solicitor General's invitation brief, the United States recasts the Sixth Circuit's opinion as holding that Michigan failed to state a § 2710(d)(7)(A)(ii) claim, rather than holding that Michigan's claim does not satisfy § 1331 federal-question jurisdiction. U.S. Br. 13. Of course, Michigan claims that the Vanderbilt casino violates the parties' compact and numerous IGRA provisions, not just § 2710. Regardless, the United States did not take the position that federal courts lack § 1331 jurisdiction over IGRA disputes.

In sum, allowing a state or a tribe to proceed in federal court to address a compact breach is consistent with Congress's desire to balance the interests of tribes and states and to protect the integrity of tribal gaming. The federal courts have jurisdiction under § 1331 to decide the numerous federal questions this case presents.

B. Bay Mills does not have sovereign immunity from a state suit seeking to enjoin the Tribe's illegal gaming on lands subject to Michigan jurisdiction.

1. IGRA abrogates tribes' sovereign immunity for illegal gaming activity on sovereign state lands.

a. Congressional intent

Congress enacted IGRA pre-*Kiowa*, with the understanding and expectation that states could enforce state law in federal court against tribes engaged in illegal, off-reservation gaming. That understanding manifests itself in IGRA's text and structure in at least three ways.

First, 18 U.S.C. § 1166 assimilates all state anti-gambling laws into federal law and makes then applicable to violations of those anti-gambling laws that occur in Indian country and do not involve gambling that is authorized under a tribal-state compact:

> (a) Subject to subsection (c), for purposes of Federal law, *all State laws pertaining to the licensing, regulation, or prohibition of gambling*, including but not limited to

> criminal sanctions applicable thereto, shall apply in Indian country *in the same manner* and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not *conducted* or sanctioned *by an Indian tribe*, which, although not made punishable by any enactment of Congress, *would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred*, under the laws governing the licensing, regulation or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment. [18 U.S.C. § 1166 (emphasis added).]

It is not plausible that Congress intended that a state would be able to invoke § 1166 as a basis to bring a civil suit to enforce anti-gambling laws in Indian country but be unable to do so on sovereign state lands, even when the defendant is an Indian tribe. The reasonable inference from § 1166 is that Congress expected states to bring civil actions in the latter context as well.

In fact, Congress assumed as much in § 1166 when it specifically stated that acts of tribes would be punishable under the assimilated laws, just as they "would be punishable if committed within the jurisdiction of the State in which the act . . . occurred . . . ." If there was no punishment for a tribe guilty of illegal, off-reservation gaming under state law, § 1166 itself would have no teeth.

Second, when Congress enacted IGRA, it was acutely aware of this Court's then recent decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which confirmed that states could not regulate tribal gaming activities that occur *in Indian country* unless Congress passed a law that allowed such regulation. *Id.* at 207. Congress specifically made a legislative finding on this point, limited to conduct "on Indian lands":

> (5) Indian tribes have the exclusive right to regulate gaming activity *on Indian lands* if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. [25 U.S.C. § 2701 (emphasis added).]

Given this precedent (i.e., that a state could not seek a remedy for unlawful gaming that occurred *on Indian lands*), it would make complete sense for Congress, when rewriting the law to give States *more* authority to enforce their public policies against gaming, to unequivocally express its intention to allow states to obtain an injunctuion for unlawful gaming *even when occurring on Indian lands*, a place where such a remedy was previously unavailable.

Conversely, it makes no sense to interpret the phrase "on Indian lands" as a limitation on access to federal courts when gaming occurs *outside* Indian lands. Such a conclusion ignores the significance of a state's sovereignty over lands within its own jurisdiction. And it disregards the reality that the NIGC, the agency primarily charged with keeping

tribal gaming honest,[15] cannot exercise jurisdiction over a tribe's illegal gaming if such gaming takes place outside Indian lands. J.A. 102–07. It just doesn't add up that Congress would have structured IGRA in a way that bars states and the NIGC—the two parties best situated to remedy unlawful gaming—from federal court, merely because unlawful gaming takes place outside Indian lands.

Third, it is inconceivable that Congress intended to give states a greater ability to deal with illegal Indian gaming *on* Indian lands than *off* of Indian lands. If state sovereignty means anything, it must include the ability to stop illegal conduct on lands under state jurisdiction.

b. *Seminole*'s holistic approach

It is appropriate for this Court to view IGRA's text and structure as a whole to discern whether Congress intended to abrogate tribal sovereign immunity in the context of illegal, off-reservation gaming. That is the same approach the Court followed in *Seminole Tribe*, when the question of abrogation under 25 U.S.C. § 2710(d)(7)(A)(i) (rather than subdivision (ii)) was at issue.

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[15] E.g., 26 U.S.C. §§ 2704 (establishing the NIGC), 2706 (defining powers of NIGC, including monitoring and inspecting tribal gaming operations, conducting background investigations, and promulgating regulations to implement IGRA), 2710 (subjecting tribal gaming ordinances and resolutions to NIGC approval), 2711 (subjecting tribal gaming management contracts to NIGC approval) and 2713 (authorizing NIGC to impose civil penalties and close tribal games for violations of IGRA).

In *Seminole*, the Tribe sued the State of Florida, alleging that the State had failed to negotiate in good faith for a gaming compact. For such an action to proceed in federal court, the Court needed to conclude that Congress had unequivocally expressed an intention to abrogate the State's Eleventh Amendment immunity when it passed IGRA. 517 U.S. at 55.

The Court considered the possibility that § 2710(d)(7)(A)(i) did not unequivocally express an intention to abrogate a state's immunity because the provision does not identify *who* can be sued when a state fails to negotiate in good faith. But by consulting the rest of IGRA, the Court easily inferred a congressional intent to abrogate:

> Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon the State . . ."; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith . . ., the court shall order the State . . ."; § 2710(d)(7)(B)(iv) provides that "the State shall . . . submit to a mediator appointed by the court" and subsection (B)(v) of § 2710(d)(7) states that the mediator "shall submit to the State." Sections

> 2710(d)(7)(B)(vi) and (vii) also refer to the "State" in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe under § 2710(d)(7)(A)(i). In sum, we think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit. [*Seminole Tribe*, 517 U.S. at 57.]

Applying *Seminole Tribe*'s holistic method of determining IGRA abrogation here, the Court should similarly conclude that Congress abrogated tribal immunity for illegal gaming occurring both on and off reservation. The statutory structure and context "make it indubitable" that Congress intended to empower states with the authority to prevent or halt illegal Indian gaming.

If IGRA's provisions are insufficient to show that abrogation is "unequivocally expressed" in the statute under the approach this Court endorsed in *Seminole Tribe*, then the Court should consider overruling *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). In *Santa Clara Pueblo*, the Court adopted essentially the same test for finding abrogation of tribal immunity (a non-constitutional, common-law immunity) as for finding abrogation of states' Eleventh Amendment immunity and waiver of the United States' own immunity. The test is that such abrogation or waiver must be "unequivocally expressed" in the statute in question. *Santa Clara Pueblo*, 436 U.S. at 58; *Seminole Tribe*, 517 U.S. at 55.

Michigan has been unable to find a case that describes the logic of applying the same test for abrogation of tribal immunity as for abrogation of Eleventh Amendment immunity. And indeed, there are good reasons to distinguish between these circumstances.

For example, it is logical to scrutinize any statute that purports to abrogate state immunity because state immunity is constitutional and courts should not lightly presume that Congress intends to attempt to abrogate it. U.S. Const. amend XI; *Seminole Tribe*, 517 U.S. at 55. But tribal immunity has no constitutional dimension and is solely a creature of the common law. As a result, when Congress passes a statute that abrogates tribal immunity, it would be reasonable to interpret it in the same manner as any other statute that affects the common law.

Moreover, while the sovereignty of tribes deserves respect, there is no dispute that tribes' status is entirely dependent on the will of Congress. *Jicarilla Apache Nation*, 131 S. Ct. at 2323. This is the exact opposite of the relationship of Congress and the states. The only authority that Congress has over the states is the power the states themselves transferred to Congress in the Constitution. U.S. Const. amend. X. In light of the distinct differences in the relationships of states and tribes to the United States, there is good reason to think that a different test for discerning the intent of Congress to abrogate the respective immunities of states and tribes–specifically, a less strict standard when considering abrogation of tribal immunity–would make sense.

Likewise, there is an obvious distinction between the act of the federal sovereign waiving its own immunity from suit and when it abrogates the immunity of a dependent nation, particularly where a court is interpreting the legislation that effects the abrogation. As one of the three coordinate branches of government, courts properly hesitate to subject the other branches of government directly to the court's authority. E.g., *U.S. Fire Ins. Co.* v. *United States*, 806 F.2d 1529, 1534–1535 (11th Cir. 1986); *Tucson Airport Auth.* v. *General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998). Thus, looking for a congressional expression of intent to allow the government to be sued in court respects the constitutional separation of powers and is a reasonable approach to interpreting legislation that may waive federal immunity.

Since tribes are subject to the plenary authority of Congress, there is no reason for courts to exercise the same caution when considering an abrogation of a tribe's common-law immunity from litigation. Legislation abrogating common-law immunity raises no separation of powers issues—"Congress plainly can override" "common-law adjudicatory principles," *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012)—and should be interpreted in the usual way, without any heightened standard.

In sum, when construed in an ordinary manner, IGRA (e.g., 18 U.S.C. § 1166) makes clear that if Congress believed that tribal immunity existed in the context of illegal, off-reservation gaming at all, Congress must have intended to abrogate that immunity. Indeed, keeping in mind that this Court

defers to Congress when it comes to limiting the scope of tribal sovereign immunity, *Kiowa*, 523 U.S. at 759–60, it would be passing strange for the Court to hold—in the name of deferring to Congress—that tribes have full immunity from suit in this context. Such a holding would undermine all of Congress' expectations and assumptions about tribal immunity at the time of IGRA's enactment, at least with regard to tribes' illegal, off-reservation activity.

c. Comparison to foreign immunity

There is also a direct analogy here to the law of foreign sovereign immunities. When courts interpret legislation to determine whether it abrogates the common-law immunity of foreign nations, they do not require an unequivocal congressional expression.

For example, in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), this Court interpreted the Foreign Sovereign Immunities Act to allow an abrogation of Austria's immunity to suit for conduct that occurred before the statute was enacted, even though the Court acknowledged that the language on which the abrogation was based wasn't unequivocal: "Although the FSIA's preamble *suggests* that it applies to preenactment conduct, . . . that statement by itself falls short of an "expres[s] prescri[ption of] the statute's proper reach." *Id.* at 694 (emphasis added). The Court said that while the abrogation provision was unambiguous, it was "perhaps not sufficient to satisfy [an] 'express command' requirement." In short, the Court did *not* require a clear-statement rule to determine whether Congress intended to abrogate foreign sovereign immunity, but instead applied ordinary rules of construction.

In a similar vein, in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), this Court did not require a clear statement to abrogate foreign sovereign immunity. Instead, the Court consulted the customary practices at the State Department prior to enactment of the FSIA to determine what the term "commercial" meant in the statute. *Id.* at 612–13. Noting that the statute itself did not define this critical term, the Court held that Congress had intended to abrogate the foreign sovereign immunity where the foreign government was not acting as a regulator in the marketplace, but rather as a player. *Id.* at 614. To come up with this test, the Court did not require an unequivocal expression from Congress. Rather, it relied on evidence from other court decisions of what the so-called "restrictive" theory of foreign sovereign immunity would have permitted, as the Court believed that this was what Congress intended to codify when it adopted the FSIA. *Id.* at 612–13.

As noted in *Altmann*, the law of foreign sovereign immunity resulted from a pragmatic political concern: since there would be times when the United States might be sued in the courts of foreign nations, honoring such nations' sovereignty when sued here could be the difference between getting cases against the United States dismissed or having to defend them in a foreign court. 541 U.S. at 696. So there could be serious consequences to the United States' own sovereignty flowing directly from any decision to abrogate the sovereignty of another country. Under these circumstances, a good argument could be made for requiring a stricter than usual standard for construing Congress's words.

Yet, as evidenced by *Altmann* and *Weltover*, no such standard has evolved for determining whether Congress abrogated the immunity of foreign nations. If courts are free to employ a traditional standard for construing language abrogating *foreign* sovereign immunity, they should be able to do so when *tribal* immunity is at issue.

Although not stated in precisely these terms, the Seventh, Ninth, Tenth, and Eleventh Circuits all appear to follow this less-strict approach to abrogation. When confronted with a lawsuit alleging an IGRA or tribal-state compact violation, none of these circuits parsed § 2710 as did the Sixth Circuit here. Instead, these circuits looked at IGRA *in toto* and held there is abrogation whenever IGRA or compact compliance is at issue. E.g., *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008) (IGRA abrogates tribal sovereign immunity for any claim alleging a violation of a gaming compact arising from the § 2710(d)(3)(C) list of compact-negotiation subjects); *Lewis* v. *Norton*, 424 F.3d 959, 962–63 (9th Cir. 2005) ("The IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue."); *Mescalero Apache Tribe*, 131 F.3d at 1385–86 ("IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought."); *Florida* v. *Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999) ("Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact.").

In sum, whether viewed from a strict or more lenient standard, IGRA as a whole demonstrates a congressional intent to abrogate tribal immunity from suit whenever a tribe engages in illegal gaming, whether on- or off-reservation. In tandem with § 1331 federal-question jurisdiction, federal jurisdiction authorized and tribal immunity did not prohibit the preliminary-injunction order.

2. Alternatively, the Court should confirm that tribes do not have sovereign immunity with respect to illegal commercial activity on lands under state jurisdiction.

The scope of tribal immunity is a bit muddled after *Kiowa*. In his *Kiowa* dissent, Justice Stevens observed that the Court had never expressly "applied the [tribal immunity] doctrine to purely off-reservation conduct . . .", nor had the Court ever "considered whether a tribe is immune from a suit that has no meaningful nexus to the Tribe's land or its sovereign function." *Kiowa*, 523 U.S. 764. In response, the *Kiowa* majority acknowledged that the Court's cases had "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred," nor had the Court "yet drawn a distinction between governmental and commercial activities of a tribe." *Id.* at 754–55 (numerous citations omitted). Ultimately, the *Kiowa* majority appeared to resolve the case on the narrow ground that the suit involved a commercial contract: "Tribes enjoy immunity from suit *on contracts*, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760 (emphasis added).

The dialogue between the *Kiowa* majority and dissent can be read in either of two ways. The majority could have been saying that tribal immunity extends even to commercial, off-reservation conduct. Or the majority could have been saying that it was leaving open the question whether tribal immunity applies to commercial, off-reservation conduct.

Two factors support the view that the majority was issuing only a narrow, contract-based ruling and *not* resolving the on/off reservation and commercial/ government dilemmas. First, the *Kiowa* majority expressly deferred to "the role Congress may wish to exercise in this important judgment." 523 U.S. 758. It would have been unnecessary to issue a definitive ruling regarding the scope of tribal immunity in such a circumstance.

Second, the Court in *C & L Enterprises* characterized *Kiowa*'s holding as being only narrow and contract-based: "Tribal immunity, we ruled in *Kiowa*, extends to suits on off-reservation commercial contracts." 532 U.S. at 418. If *Kiowa* stood for a much broader proposition, one would expect the Court in *C & L Enterprises* to have said so.

A narrow reading of *Kiowa* makes perfect sense in the context of that case, i.e., commercial contracts. For purposes of the serious question of whether sovereign immunity bars a claim, it can be difficult to determine "where" a contract takes place. Assuming the place of execution can even be determined, is that dispositive? Or should a court consider where the parties performed the contract? Or the law the parties chose to govern the contract?

Given the vagaries associated with determining whether a commercial-paper contract was on or off reservation, or predominantly commercial or governmental, it was reasonable for the Court not to rule that these issues were dispositive either way. Doing so could have created problems for future, unanticipated fact scenarios.

But when a tribe opens an illegal brick-and-mortar casino, as Bay Mills did here, it is obvious illegal activity is taking place there (as well as the location where that illegal casino was authorized and is supervised). So regardless of what the Court said or meant in *Kiowa*, the Court should take the opportunity presented by the facts here and confirm that tribes do *not* have sovereign immunity from suits based on illegal, off-reservation, commercial conduct. Numerous reasons support that result.

To begin, *Kiowa* acknowledged that, even 15 years ago, developments in tribal commercial activities, whether on or off reservation, weighed *against* granting sovereign immunity protection from suit. 523 U.S. at 758. Since *Kiowa*, tribal gaming revenues have more than tripled, to the point where such gaming is presenting a serious challenge even to private commercial gaming enterprises. If there was a "need to abrogate tribal immunity" for commercial activities, as the Court seemed to suggest in 1998, *Kiowa*, 523 U.S. at 758, surely that need is much greater today. Gaming tribes in particular no longer have "nascent tribal governments" that need protection "from encroachments by States." *Id.* Leveling the playing field makes sense.

In addition, Congress has failed (and is unlikely) to act. This reality does not mean that Congress prefers to leave things as they are, or that it opposes action by this Court clarifying the scope of tribal immunity. *Girouard* v. *United States*, 328 U.S. 61, 69 (1946) ("'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.' It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.") (quotation omitted). There are many reasons why Congress does not pass new laws. Obtaining agreement of both bodies of Congress and the President on new legislation seems to be getting increasingly difficult as time passes. *Zuber* v. *Allen*, 396 U.S. 168, 185 (1969). This is particularly so with regard to comprehensive legislation of the sort *Kiowa* recommended.

Nor will limiting immunity to a tribe's governmental, on-reservation functions deprive the tribe of sufficient protection of its sovereign interests. In fact, immunity from suit is not the primary economic advantage tribes have enjoyed in the area of gaming. Even without immunity, tribes would still have the benefit of their own jurisdiction to generally regulate their own conduct within Indian country, at least to the extent not pre-empted by federal law. This provides them with a major economic advantage in areas such as gaming that most of their potential competitors, whose casinos are subject to state regulation, do not have. This advantage promotes the aim of Congress to provide for tribes' economic security, whether they are immune from suit or not.

Add to this the fact that a party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe's waiver of sovereign immunity from suit. The victim of a tort that takes place at an off-reservation casino does not have the same negotiating leverage as a commercial party that possesses something of value that a tribe would like to have.[16]

In the end, tribal immunity is a federal common-law doctrine that this Court has created and is empowered to adjust. There are ample reasons why, when it comes to illegal commercial conduct occurring on lands under state jurisdiction, tribes should not be immune from suit. Michigan respectfully requests that the Court so hold here.

Such a holding would mirror the common-law development in the area of foreign-nation immunity. As noted in *Kiowa*, foreign sovereign immunity began as a judicial doctrine, just like tribal immunity. 523 U.S. at 759. Before Congress finally stepped in and adopted the Foreign Sovereign Immunities Act, U.S. courts developed their own body of law that evolved from nearly universal immunity to immunity limited to only the governmental activities of a foreign nation.

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[16] Notably, Michigan tried to protect itself here. Consistent with federal law, the State negotiated a compact that forbade Bay Mills from opening an off-reservation casino. At the time of the compact's 1993 execution, Michigan had no need to negotiate an immunity waiver, because this Court had issued no decision suggesting that Michigan could not enjoin illegal conduct occurring on lands under Michigan's own jurisdiction.

The commercial enterprises of foreign nations eventually became fully subject to litigation in United States courts. *Kiowa*, 532 U.S. at 759. The test which courts developed and Congress eventually codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*, distinguishes between commercial and governmental acts based on the "nature" of those acts. 28 U.S.C. § 1603(d). This same test could be applied to tribal commercial activities (especially illegal, off-reservation conduct). If France opened an illegal casino in Michigan, the State could enjoin it, rather than arresting French workers or suing President François Hollande. Surely domestic tribes are not entitled to greater immunity than foreign sovereign nations.[17]

Allowing states to obtain injunctions against illegal, off-reservation gaming increases the chances that states' interests will be protected. This is certainly true where states seek injunctive relief to prohibit public nuisances created by unlawful gaming. The evolution of tribal gaming warrants a similar evolution in the common law of tribal immunity, and this Court should hold that tribes have no immunity from suit regarding illegal casino gaming, whether on- or off-reservation.

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[17] Although this Court has declined to apply the "commercial" test to states' Eleventh Amendment immunity, it did so because that immunity, unlike foreign sovereign immunity, is "a constitutional doctrine that is meant to be both immutable by Congress and resistant to trends." *College Sav. Bank* v. *Florida Prepaidpostsecondary Ed. Expense Bd.*, 527 U.S. 666, 686 (1999). Of course, as discussed above, tribal immunity is not constitutionally based and, as an entirely common-law doctrine, is mutable, just like foreign sovereign immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

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STATE OF MICHIGAN,
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v.
BAY MILLS INDIAN COMMUNITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands.

2. Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Legal Background 2

B. The Underlying Dispute 9

C. Procedural History 13

SUMMARY OF ARGUMENT 17

ARGUMENT 19

I. THIS CASE DOES NOT PRESENT THE QUESTION OF THE DISTRICT COURT'S AUTHORITY TO ENJOIN A GAMING ACTIVITY *ON* INDIAN LANDS 19

II. BAY MILLS AGREES THAT THE DISTRICT COURT WOULD HAVE HAD SUBJECT MATTER JURISDICTION IF NOT FOR BAY MILLS' IMMUNITY 23

III. BECAUSE MICHIGAN'S CLAIMS DO NOT FALL WITHIN THE PLAIN LANGUAGE OF SECTION 2710(d)(7)(A)(ii), BAY MILLS IS IMMUNE FROM THIS SUIT 25

TABLE OF CONTENTS—Continued

Page

IV. THIS COURT SHOULD REJECT MICHIGAN'S PLEA TO OVERRULE LONGSTANDING PRECEDENT REGARDING THE SCOPE OF TRIBAL IMMUNITY 34

A. Michigan's Claims Are Squarely Foreclosed By Settled Doctrine 34

B. There Is No Basis For Overruling This Court's Immunity Precedents 38

C. Tribal Sovereign Immunity Has Deep Roots In Our Legal Tradition 47

V. A WIDE VARIETY OF ENFORCEMENT OPTIONS REMAIN AVAILABLE TO STATES 53

CONCLUSION 58

ADDENDUM

18 U.S.C. § 1166 ..... 1a

25 U.S.C. § 2701 ..... 3a

25 U.S.C. § 2702 ..... 3a

25 U.S.C. § 2703 ..... 4a

25 U.S.C. § 2710 ..... 8a

TABLE OF AUTHORITIES

Page

CASES:

Adams v. *Murphy*,
165 F. 304 (8th Cir. 1908) 51

Alaska v. *Native Vill. of Venetie Tribal Gov't*,
522 U.S. 520 (1998) 3

Alden v. *Maine*,
527 U.S. 706 (1999) 53

Barnes v. *Gorman*,
536 U.S. 181 (2002) 40

Beers v. *Arkansas*,
61 U.S. 527 (1858) 48

Blatchford v. *Native Vill. of Noatak*,
501 U.S. 775 (1991) 38

Bonner v. *United States*,
76 U.S. 156 (1869) 48

Bryan v. *Itasca Cnty.*,
426 U.S. 373 (1976) 5

C&L Enterps., Inc. v. *Citizen Band Potawatomi Tribe of Okla.*,
532 U.S. 411 (2001) ..... *passim*

California v. *Cabazon Band of Mission Indians*,
480 U.S. 202 (1987) 5, 6, 28, 45

Chadick v. *Duncan*,
No. 15,317 (D.C. Mar. 2, 1894) 51

TABLE OF AUTHORITIES—Continued

Page

Cherokee Nation v. *Georgia*,
30 U.S. 1 (1831) 48

Coeur d'Alene Tribe v. *State*,
842 F. Supp. 1268 (D. Idaho 1994) 26

Dellmuth v. *Muth*,
491 U.S. 223 (1989) 26

Ex parte Young,
209 U.S. 123 (1908) 19, 37, 55

FAA v. *Cooper*,
132 S. Ct. 1441 (2012) 27

Florida v. *Seminole Tribe of Fla.*,
181 F.3d 1237 (11th Cir. 1999) 54

Franklin v. *Gwinnett Cnty. Pub. Sch.*,
503 U.S. 60 (1992) 39

Gonzalez v. *Raich*,
545 U.S. 1 (2005) 44, 45

Henderson v. *United States*,
517 U.S. 654 (1996) 25

Hilton v. *S.C. Pub. Ry. Comm'n*,
502 U.S. 197 (1991) 42

Idaho v. *Coeur d'Alene Tribe of Idaho*,
521 U.S. 261 (1997) 38

Illinois v. *Milwaukee*,
406 U.S. 91 (1972) 23

In re Sac & Fox Tribe of Miss.,
340 F.3d 749 (8th Cir. 2003) 24

TABLE OF AUTHORITIES—Continued

Page

Isbrandtsen Co. v. *Johnson*,
343 U.S. 779 (1952) 33

Jackson Transit Auth. v. *Local Div. 1285*,
457 U.S. 15 (1982) 23

Kiowa Tribe of Okla. v. *Mfg. Tech.*,
523 U.S. 751 (1998) ..... *passim*

Lac Vieux Desert Band v. *Mich. Gaming Control Bd.*,
172 F.3d 397 (6th Cir. 1999) 28

Lane v. *Peña*,
518 U.S. 187 (1996) 27

Lewis v. *United States*,
523 U.S. 155 (1998) 7

Miles v. *Apex Marine Corp.*,
498 U.S. 19 (1990) 42, 44

Moragne v. *States Marine Lines, Inc.*,
398 U.S. 375 (1970) 42

Morrison v. *Nat'l Austl. Bank Ltd.*,
130 S. Ct. 2869 (2010) 31, 32

National Farmers Union Ins. Cos. v. *Crow Tribe of Indians*,
471 U.S. 845 (1985) 23, 48

Nevada v. *Hicks*,
533 U.S. 353 (2001) 3, 28

NFIB v. *Sebelius*,
132 S. Ct. 2566 (2012) 29

TABLE OF AUTHORITIES—Continued

Page

Oklahoma Tax Comm'n v. *Citizen Band, Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) ..... *passim*

Oklahoma Tax Comm'n v. *Sac & Fox Nation*, 508 U.S. 114 (1993) 2

Oliphant v. *Suquamish Tribe*, 435 U.S. 191 (1978) 42

Parks v. *Ross*, 52 U.S. 362 (1851) 49, 50

Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 41

Paulus v. *South Dakota*, 227 N.W. 52 (N.D. 1929) 49

People of Porto Rico v. *Rosaly y Castillo*, 227 U.S. 270 (1913) 33, 48

Pulliam v. *Allen*, 466 U.S. 522 (1984) 33

Puyallup Tribe v. *Dep't of Game*, 391 U.S. 392 (1968) 36

Puyallup Tribe, Inc. v. *Dep't of Game of Wash.*, 433 U.S. 165 (1977) ..... *passim*

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TABLE OF AUTHORITIES—Continued

Page

Samantar v. *Yousuf*,
130 S. Ct. 2278 (2010) 50

Santa Clara Pueblo v. *Martinez*,
436 U.S. 49 (1978) ..... *passim*

Saudi Arabia v. *Nelson*,
507 U.S. 349 (1993) 44

Seminole Tribe of Fla. v. *Florida*,
517 U.S. 44 (1996) ..... *passim*

Sinochem Int'l Co. v. *Malaysia Int'l Shipping Corp.*,
549 U.S. 422 (2007) 24

Taxpayers of Mich. Against Casinos v. *State*,
685 N.W.2d 221 (Mich. 2004) 30

The Schooner Exchange v. *McFaddon*,
11 U.S. 116 (1812) 33, 48, 50

Thebo v. *Choctaw Tribe of Indians*,
66 F. 372 (8th Cir. 1895) 50, 51

Three Affiliated Tribes of Fort Berthold Reservation v. *Wold Eng'g*,
476 U.S. 877 (1986) 38, 46, 49

TTEA v. *Ysleta del Sur Pueblo*,
181 F.3d 676 (5th Cir. 1999) 37

Turner v. *United States*,
248 U.S. 354 (1919) 47, 51

United States v. *E.C. Invs., Inc.*,
77 F.3d 327 (9th Cir. 1996) 30

TABLE OF AUTHORITIES—Continued

Page

United States v. *King*,
395 U.S. 1 (1969) 33

United States v. *Lara*,
541 U.S. 193 (2004) 52

United States v. *Thompson*,
98 U.S. 486 (1879) 48

United States v. *U.S. Fidelity & Guaranty Co.*,
309 U.S. 506 (1940) 38, 47

United States v. *Wheeler*,
435 U.S. 313 (1978) 48

Verizon Md. Inc. v. *Pub. Serv. Comm'n of Md.*,
535 U.S. 635 (2002) 24

Verlinden BV v. *Cent. Bank of Nigeria*,
461 US 480 (1983) 43

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Wagnon v. *Prairie Band Potawatomi Nation*,
546 U.S. 95 (2005) 3, 28

Whitman v. *Am. Trucking Ass'ns, Inc.*,
531 U.S. 457 (2001) 30

Williams v. *Lee*,
358 U.S. 217 (1959) 3

Worcester v. *Georgia*,
31 U.S. 515 (1832) 46, 48

TABLE OF AUTHORITIES—Continued

Page

Zivotofsky v. *Clinton*,
132 S. Ct. 1421 (2012) 57

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. XI 9

U.S. Const. art. I, § 8, cl. 3 52

STATUTES:

5 U.S.C. § 554(e) 57

15 U.S.C. § 378(c)(1)(B) 39

15 U.S.C. § 1172 57

18 U.S.C. § 1166 ..... 7, 29, 30

18 U.S.C. § 1166(a) 29, 30

18 U.S.C. § 1166(b) 29

18 U.S.C. § 1166(c) 8

18 U.S.C. § 1166(d) 29

18 U.S.C. § 1716E(h)(2) 39

18 U.S.C. § 1955 56

18 U.S.C. § 2346(b)(2) 39

25 U.S.C. §§ 70 *et seq.* 10

25 U.S.C. § 81(d)(2) 39

25 U.S.C. § 450f(c)(3) 39

25 U.S.C. § 450n 39

TABLE OF AUTHORITIES—Continued

Page

25 U.S.C. § 2701(5) 6, 7
25 U.S.C. § 2702(1) 6, 29
25 U.S.C. § 2702(2) 6
25 U.S.C. § 2702(3) 7
25 U.S.C. § 2703(4)(B) 13
25 U.S.C. § 2703(6) 7, 22
25 U.S.C. § 2703(7)(A)(i) 22
25 U.S.C. § 2703(8) 7, 22
25 U.S.C. § 2706 7
25 U.S.C. § 2706(b) 7
25 U.S.C. § 2710(a) 28
25 U.S.C. § 2710(a)(1) 7
25 U.S.C. § 2710(a)(2) 7
25 U.S.C. § 2710(b)(1)(A) 8, 57
25 U.S.C. § 2710(b)(2) 9
25 U.S.C. § 2710(b)(2)(A) 22
25 U.S.C. § 2710(b)(4) 22
25 U.S.C. § 2710(c)(4) 22
25 U.S.C. § 2710(d)(1) 28
25 U.S.C. § 2710(d)(1)(A)(ii) 9
25 U.S.C. § 2710(d)(1)(B) 8, 57

TABLE OF AUTHORITIES—Continued

Page

25 U.S.C. § 2710(d)(1)(C) 7, 8

25 U.S.C. § 2710(d)(3) 7

25 U.S.C. § 2710(d)(3)(A) 9

25 U.S.C. § 2710(d)(3)(C) 22

25 U.S.C. § 2710(d)(3)(C)(ii) 8

25 U.S.C. § 2710(d)(3)(C)(v) 8, 36, 46, 54

25 U.S.C. § 2710(d)(4) 9

25 U.S.C. § 2710(d)(7)(A)(i) 9

25 U.S.C. § 2710(d)(7)(A)(ii) ..... *passim*

25 U.S.C. § 2710(d)(9) 22

25 U.S.C. § 2713(a) 7

25 U.S.C. § 2713(b) 7, 56

25 U.S.C. § 2717(a)(1) 22

28 U.S.C. § 1331 ..... 16, 23

28 U.S.C. § 1367 24

28 U.S.C. § 1367(a) 24

30 U.S.C. § 1300(j)(3) 39

30 U.S.C. § 1733(a)(4) 39

41 U.S.C. § 601 43

Pub. L. No. 83-280, 67 Stat. 588 (1953) 3

Pub. L. No. 105-143, 111 Stat. 2652 (1997) 11, 12

TABLE OF AUTHORITIES—Continued

Page

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Act of May 29, 1908, 35 Stat. 445 39

National Gambling Impact Study Commission Act, 110 Stat. 1482 (1996) 3

Mich. Comp. Laws § 432.218(3)(d) 56

Mich. Comp. Laws § 432.220 56

Mich. Act 239 of 1972 4

RULES:

S. Ct. R. 14(1)(a) 21

S. Ct. R. 24.1(a) 21

REGULATIONS:

25 C.F.R. § 11.118(d) 40

25 C.F.R. § 44.102(a) 40

25 C.F.R. § 84.006(a)(2) 40

25 C.F.R. § 162.012(a)(4)(ii) 40

25 C.F.R. § 162.014(d) 40

25 C.F.R. § 273.1(d)(1) 40

25 C.F.R. § 573.4 56

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42 C.F.R. § 136.118(a) 40

TABLE OF AUTHORITIES—Continued

Page

42 C.F.R. § 137.3(a) 40

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Act to Provide For and Approve the Settlement of Certain Land Claims of the Bay Mills Indian Community: Hearing on H.R. 2176 Before the H. Nat. Resource Comm., 110th Cong. (2008) 10

TRIBAL-STATE GAMING COMPACTS:

Class III Gaming Compact Between the Sac & Fox Nation and the State of Oklahoma (Mar. 10, 2005) 8

Compact Between the Sovereign Indian Nation of the Omaha Tribe of Nebraska and the Sovereign State of Iowa (Jan. 19, 2007) 55

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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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IN THE

Supreme Court of the United States

No. 12-515

STATE OF MICHIGAN,

Petitioner,

v.

BAY MILLS INDIAN COMMUNITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

INTRODUCTION

This is one of the rare cases before this Court that is squarely controlled by settled precedent. Michigan sued the Bay Mills Indian Community by name, seeking severe financial penalties and an injunction against the tribe. This Court has repeatedly held that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla.* v. *Mfg. Tech.*, 523 U.S. 751, 754 (1998). Neither exception applies here: Congress has not abrogated Bay Mills' immunity, and Bay Mills has not waived it. Michigan therefore cannot sue Bay Mills.

Michigan recognizes the obstacle posed by this Court's precedent and earnestly tries to evade it.

The state asks the Court either to rewrite the Indian Gaming Regulatory Act's plain language or, instead, to overturn the decades of accumulated precedent Congress has sanctioned. Just as the Court has repeatedly rejected previous entreaties to usurp Congress's role in this area, it should do so again in this case.

The underlying dispute in this case—which concerns the status of certain lands that Bay Mills owns—can and should be resolved. There are a variety of means for doing so, including following the dispute resolution procedure both parties agreed to in their gaming compact: arbitration. There is no reason for the Court to rewrite the law or discard settled doctrine simply because Michigan is now unhappy with the bargain it struck.

Because Bay Mills did not waive its immunity, and Congress did not abrogate it, the case cannot go forward against the tribe—regardless of the answers to academic questions about whether IGRA or some other statute would otherwise have provided the district court with subject matter jurisdiction. A straightforward application of the doctrine of tribal sovereign immunity thus resolves this case.

STATEMENT OF THE CASE

A. Legal Background

1. Our nation has a " 'deeply rooted' " tradition of " 'leaving Indians free from state jurisdiction and control.' " *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (citation omitted). Consistent with that tradition, states generally cannot apply their laws within Indian country without congressional authorization. *Cohen's*

Handbook of Federal Indian Law § 6.01 (2012) (hereinafter "Cohen"). However, states generally are free to apply their nondiscriminatory laws to Indians outside of Indian country. *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005); *Nevada* v. *Hicks*, 533 U.S. 353, 362 (2001). The extent of states' authority over Indian affairs thus turns in large part on whether the regulated activity occurs within "Indian country"—a term of art that includes reservations and certain other Indian lands. *See Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 526-27 (1998).

Over the years, Congress has made exceptions to the general rule forbidding the exercise of state regulatory jurisdiction within Indian country. Cohen § 6.01. For example, in 1953, Congress expressly granted five states the authority to apply their criminal and civil adjudicatory laws within parts of Indian country and gave other states the opportunity to assume such authority. Pub. L. 83-280, §§ 2, 7, 67 Stat. 588, 590 (1953). The great majority of states—including Michigan—elected not to do so, evidently out of concern that the "burdens accompanying such power might be considerable." *Williams* v. *Lee*, 358 U.S. 217, 223 (1959). Most tribes thus retain a fair degree of legal autonomy on their own lands.

2. The legal separation between states and tribes has occasionally led to economic competition. The modern history of gaming is an example of just that. By the 1980s, many states had turned to legalized gaming "as a source of jobs and additional revenue." National Gambling Impact Study Commission Act, § 2(2), 110 Stat. 1482, 1482 (1996). Michigan, for instance, established a state lottery in 1972 to

support its public education system. *See* Mich. Act 239 of 1972. A few years later, the people of New Jersey voted to permit high-stakes casino gambling as a means of revitalizing Atlantic City. *See* Martin Waldron, *Atlantic City Casinos Approved*, The New York Times, Nov. 3, 1976. Today, forty-eight states permit some form of private gaming, and forty-four run lotteries. From horse tracks to slot machines to glittering new casinos, states have capitalized on the revenue and development opportunities provided by legalized gaming. *See* Pamela M. Prah, *Kansas Has Biggest Jump in Casino Tax Revenue, New Jersey Has Largest Drop*, Stateline, May 6, 2013.

Michigan has enthusiastically participated in this dramatic expansion of legalized gaming. Besides the lottery, Michigan has four horse racing tracks and three full-scale casinos that took in over $1.5 billion in 2012 alone. *See* Michigan Gaming Control Board, *2012 Annual Report to the Governor* 46-47 (Mar. 12, 2013); Michigan Gaming Control Board, *2012 Horse Racing Annual Report to the Governor* 4 (Apr. 15, 2013). The city of Detroit has become especially dependent on gaming revenues. A recent bankruptcy filing revealed that casino tax revenue accounts for roughly 30% of its total available cash on hand. *See* Chris Isidore, *Casinos, Not Cars, Are Keeping Detroit Afloat*, CNNMoney, July 19, 2013.

Indian tribes have not been oblivious to these developments. In the late 1970s, inspired by the states' financial successes and limited in their ability to raise funds through traditional means like property taxes, a few tribes began setting up bingo halls and other gaming facilities as a way to offset rapidly declining federal aid. States did not welcome

these new market entrants, however. Prodded by private gaming interests, several states that had assumed criminal jurisdiction over Indian country soon threatened to enforce their licensing and other gaming laws against the tribes. Despite claiming to be concerned about mafia infiltration of tribal gaming enterprises, the states' "true interest" in opposing Indian gaming has always been "protection of their own games from a new source of economic competition." S. Rep. No. 100-446, at 33 (1988) (additional views of Sen. McCain). When tribes resisted those anticompetitive efforts, litigation ensued.

One of those tribal-state disputes eventually came before this Court. In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 206 (1987), two tribes had obtained a declaratory judgment that California had no authority to enforce its gambling laws within the boundaries of the tribes' reservations. This Court upheld that judgment, reaffirming the fundamental importance of tribal sovereignty. The Court first held that Congress's delegation of criminal enforcement authority to California did not extend to state laws regulating gaming. Although California had affixed criminal penalties to those laws, *id.* at 209, 211, the Court concluded that they were not "criminal" in the relevant sense because they merely regulated gaming and did not prohibit it as a matter of public policy, *id.* at 209-10 (citing *Bryan* v. *Itasca Cnty.*, 426 U.S. 373 (1976)). The Court also held that California did not have the inherent authority to apply its gaming laws within Indian country. It recognized that in some situations a state's regulatory interest might be powerful enough " 'to justify the assertion of state authority' "

within Indian country, regardless of the background presumption that state laws do not apply. *Id.* at 216 (citation omitted). But in the context of gaming, the Court found that the federal and tribal interests in tribal self-government and economic development far outweighed California's asserted interests. *Id.* at 221-22.

3. By the time of the *Cabazon* decision, Congress had been considering Indian gaming legislation for several years. States and the private gaming industry were pressuring Congress to extend state regulatory jurisdiction into Indian country or even prohibit Indian gaming outright. *See* Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L.J. 99, 112-50 (2010). But *Cabazon*, and its recognition of the importance of tribal sovereignty, reoriented the debate and prompted a compromise that became the Indian Gaming Regulatory Act of 1988 (IGRA). *Id.* at 154-56.

IGRA adopted as its foundation the *Cabazon* principle of tribal sovereignty. Congress expressly recognized that tribes have the "exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). It then supplemented that foundation with a federal statutory framework intended to ratify and regulate gaming on Indian lands. *Id.* § 2702(1)-(2).

IGRA's regulatory scheme divides gaming into three separate classes. Class I gaming, which

includes social games and traditional tribal games, is under the exclusive regulatory jurisdiction of the tribe. *Id.* §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo and certain card games like poker, is primarily within the jurisdiction of the tribe but subject to federal oversight. *Id.* §§ 2703(7), 2706(b), 2710(a)(2). Class III gaming includes everything else, from lotteries to dog racing to slot machines. *Id.* § 2703(8); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 48 (1996). Instead of prescribing a uniform regulatory structure for class III gaming, Congress mandated that tribes and states negotiate compacts that delineate the respective rights and responsibilities of the two sovereigns. 25 U.S.C. § 2710(d)(1)(C), (d)(3). These gaming compacts were seen as a compromise between the states and tribes, both of which had sought full regulatory control over class III gaming on Indian lands. *See* S. Rep. No. 100-446, at 4-6 (1988).

IGRA also created the National Indian Gaming Commission, a federal regulatory commission that plays an important role in overseeing Indian lands gaming. *See id.* §§ 2702(3), 2706(b). The Commission promulgates regulations, and it has substantial power to enforce IGRA and its own regulations by levying civil fines and issuing closure orders. *Id.* §§ 2706, 2713(a)-(b). In addition, Congress buttressed federal oversight by assimilating all state gambling laws into federal law within Indian country and authorizing the United States to prosecute violations of those laws. 18 U.S.C. § 1166; *cf. Lewis* v. *United States*, 523 U.S. 155, 160-61 (1998) (describing the similar Assimilative Crimes Act). Gaming authorized by

IGRA is exempt from those penalties. 18 U.S.C. § 1166(c).

States play an important role under IGRA as well. Although Congress denied them the general regulatory authority they had sought, it increased their power in two important ways. First, Congress prohibited Indian tribes from conducting class II or class III gaming on Indian lands unless their state "permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2710(b)(1)(A), (d)(1)(B). Indian gaming, in other words, is permissible only in states like Michigan that have legalized gaming. States are free to prohibit all gaming, which would preclude Indian gaming within their borders. Only Utah and Hawaii have chosen that option, however.

Second, by providing that tribes may engage in class III gaming on their lands only if they have entered into a gaming compact with their state, *id.* § 2710(d)(1)(C), IGRA gives states considerable leverage to set the regulatory parameters for the most lucrative types of gaming. Important compact terms include the allocation of criminal and civil enforcement jurisdiction between the tribe and the state, *id.* § 2710(d)(3)(C)(ii), and remedies for breach of contract, *id.* § 2710(d)(3)(C)(v). Some tribes have ceded enforcement jurisdiction to the states in their compacts, *see, e.g.*, Class III Gaming Compact Between the Sac & Fox Nation and the State of Oklahoma, pt. 8 (Mar. 10, 2005), whereas others, including Bay Mills, have not, *see* Pet. App. 80a-87a. Similarly, some tribes and states have expressly waived their respective sovereign immunities and consequently have authorized lawsuits for breach of

compact, *see, e.g.*, Gaming Compact between the Seminole Tribe of Florida and the State of Florida, pt. XIII(D) (Apr. 7, 2010), whereas others, including the State of Michigan and Bay Mills, have opted for arbitration and other alternative dispute resolution procedures, *see* Pet. App. 89a-90a.

Congress attempted to offset the states' superior bargaining power by imposing on them a judicially enforceable duty to negotiate gaming compacts in good faith. 25 U.S.C. § 2710(d)(3)(A), (d)(7)(A)(i). But this Court held that the Eleventh Amendment prevents tribes from suing to enforce that duty. *Seminole Tribe*, 517 U.S. at 47. After *Seminole Tribe*, many states (including Michigan), leveraged their immense bargaining power to demand a share of tribes' gaming revenues—even though IGRA contemplates that tribal gaming revenue will be used for the benefit of tribes, not states. 25 U.S.C. § 2710(b)(2), (d)(1)(A)(ii), (d)(4); *see* Steve Carmody, *Striking a New Deal with Some of Michigan's Native American Tribes on Gaming Revenue*, Michigan Radio, Aug. 13, 2013.

B. The Underlying Dispute

The Bay Mills Indian Community has lived in what is now the State of Michigan for centuries. Continuously acknowledged since the earliest European contacts with the area, Bay Mills has been federally recognized in its current form since 1936. The tribe has approximately 2,000 registered members, the majority of whom reside on or near the Bay Mills Reservation in Michigan's Upper Peninsula.

The modern-day Bay Mills Reservation, which consists of land held in trust by the federal government, covers just a fraction of the territory the tribe's ancestors originally occupied. At the turn of the nineteenth century, Bay Mills and other Indian bands inhabited a large part of what would become the State of Michigan. *See* J.A. 23-25. By 1855, however, the federal government had purchased the vast majority of this land through cession treaties, paying only a pittance for valuable property and often taking more land than it had bargained for in the treaties. *See id.*; *see also Act to Provide For and Approve the Settlement of Certain Land Claims of the Bay Mills Indian Community: Hearing on H.R. 2176 Before the H. Nat. Resource Comm.*, 110th Cong., at 63-67 (2008) (statement of Jeffrey D. Parker) (explaining how the federal government took title to thousands of acres that had been expressly reserved for Bay Mills' ancestors).

For years, Bay Mills sought fair compensation for lands it lost in these treaties. As part of that effort, the tribe filed several successful claims under the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70 *et seq.* The Indian Claims Commission recognized that the federal government had purchased much of Bay Mills' ancestral land on unconscionable terms and awarded Bay Mills money judgments for its losses. *See* U.S. Indian Claims Commission, *August 13, 1946–September 30, 1978: Final Report* 26-27, 65 (1979).

Congress appropriated funds to pay these judgments in the 1970s, but more than a quarter century passed before Bay Mills actually received the money it was owed. It was only after the tribe sued

the Department of Interior that the government began developing legislation to distribute Bay Mills' judgment awards. *See* Order, *Bay Mills Indian Cmty.* v. *Babbitt*, No. 96-0553 (D.D.C. Sept. 16, 1996). That legislation ultimately became part of the Michigan Indian Land Claims Settlement Act, which Congress passed in 1997. *See* Pub. L. No. 105-143, 111 Stat. 2652.

The Settlement Act provided for the disbursement of funds that had been awarded by the Claims Commission to Bay Mills and several other Michigan tribes. The Act distributed each tribe's funds differently, and tribes individually participated in developing the substance and form of their respective distribution plans. Bay Mills officials were deeply involved in drafting their portions of the Act. *See* Dkt. 14-5 (Decl. of Jeffrey D. Parker).[1] In its final form, the Settlement Act directed that 20% of the funds awarded to Bay Mills be deposited in a "Land Trust" and required that earnings from the Trust "be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase and exchange." 111 Stat. 2658. In a critical provision, the Act specified: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held." *Id.*

In the meantime, in an effort to promote the economic welfare of its members, Bay Mills negotiated and entered into an IGRA gaming

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[1] Unless otherwise noted, citations to the district court record are to the docket in Western District of Michigan case number 10-cv-1273-PLM.

compact with Michigan in 1993. Pet. App. 73a-96a. The compact, like IGRA itself, authorizes certain kinds of gaming "on Indian lands." Pet. App. 78a. The compact makes clear, however, that neither Bay Mills nor Michigan otherwise waived its sovereign immunity by entering into it. Pet. App. 90a ("Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity."). Notably, the compact also sets out dispute resolution procedures that govern "[i]n the event either party believes that the other party has failed to comply with or has otherwise breached any provision of [the] Compact." Pet. App. 89a. The aggrieved party is to notify the other party of its grievance; representatives of both parties are to meet within thirty days to attempt to settle their differences; and if that fails, a panel of arbitrators is to resolve the dispute. Pet. App. 89a-90a.

Shortly after the compact was finalized, the National Indian Gaming Commission approved Bay Mills' gaming ordinance. *See* Pet. App. 107a-170a (as amended). Consistent with both the compact and the ordinance, Bay Mills then proceeded to establish its own Gaming Commission. Bay Mills has continuously operated one or more gaming facilities on its reservation ever since.

In August 2010, Bay Mills used funds from its Settlement Act land trust to purchase a plot of land in the economically depressed village of Vanderbilt, Michigan. Under the terms of the Settlement Act, Bay Mills holds the Vanderbilt tract "as Indian lands are held." 111 Stat. 2658. Bay Mills understands this language—which the tribe specifically

negotiated—to mean that the land qualifies as "Indian lands" within the meaning of IGRA because it is "subject to restriction by the United States against alienation" and within the tribe's regulatory jurisdiction. 25 U.S.C. § 2703(4)(B). Because IGRA, the Bay Mills-Michigan gaming compact, and the Bay Mills gaming ordinance all authorize gaming on "Indian lands," Bay Mills determined that it could open a small gaming facility on the property.

Shortly thereafter, the Bay Mills Gaming Commission issued a class III gaming license for a facility on Bay Mills' Vanderbilt property. The Vanderbilt facility opened on November 3, 2010. Though it consisted of only 84 electronic games, the facility provided much needed employment to individuals from Vanderbilt and surrounding areas. *See, e.g.*, Dkt. 17-4 (declaration attesting that Bay Mills' Vanderbilt facility was "increasing employment" and "improving the economy"). Otsego County and Bay Mills worked together to integrate the Vanderbilt facility into the local community. *See, e.g.*, Dkt. 17-1 (declaration detailing the County and Bay Mills' discussions "to facilitate the regulation" of the Vanderbilt property). And in an effort to ensure compliance with the law, Bay Mills entered into an agreement with the county sheriff's office authorizing local officers to enforce tribal law on the property. *See* J.A. 108-15.

C. Procedural History

Soon after the Vanderbilt facility opened for business, Michigan issued a letter asserting that Bay Mills' operation of the gaming facility was in violation of federal law, state law, and the Bay Mills gaming compact because the facility was outside

Indian lands. *See* Dkt. 1-2. Bay Mills disagreed with this assessment. Highlighting the language in the Settlement Act, Bay Mills countered that the land it had purchased with Settlement Act funds was, as the statute indicated, "held as Indian lands are held."

Michigan ignored the dispute resolution procedures it had negotiated in the gaming compact and filed suit in federal court in December 2010, less than a week after it sent the letter. Michigan's original complaint—which led to the preliminary injunction, Bay Mills' interlocutory appeal, and the decision below—alleged that Bay Mills violated the terms of the compact and IGRA by conducting gaming activity outside Indian lands. The Little Traverse Bay Bands of Odawa Indians, a tribe that operates a competing gaming facility, filed a separate lawsuit making substantively similar claims. Dkt. 1 in W.D. Mich. No. 1:10-cv-1278-PLM. Both complaints named Bay Mills as the sole defendant, and both sought declaratory and injunctive relief. The two suits were consolidated.

Little Traverse filed a motion for a preliminary injunction. It supplemented the motion with opinion letters from the Department of the Interior and the National Indian Gaming Commission that were issued the day after Michigan filed its suit and concluded that the Vanderbilt property is not "Indian lands" for purposes of IGRA. J.A. 69-107.[2] Michigan

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[2] Bay Mills believes these informal opinions are deeply wrong, but has been unable to challenge them because they do not qualify as final agency actions under the Administrative Procedure Act.

filed a memorandum in support of Little Traverse's motion. The district court concluded that Little Traverse was likely to succeed on the merits of its claim that the Vanderbilt property did not qualify as "Indian lands" under IGRA and that the other preliminary injunction factors favored the plaintiffs. Pet. App. 19a-39a. Accordingly, the court preliminarily enjoined Bay Mills from operating the Vanderbilt facility. Pet. App. 38a-39a.

Bay Mills filed an interlocutory appeal, J.A. 116-17, and the court of appeals unanimously reversed, Pet. App. 1a-18a. Without addressing the merits of the underlying "Indian lands" dispute, the court of appeals concluded that the district court lacked subject matter jurisdiction over the IGRA and compact-based claims raised in Michigan and Little Traverse's original complaints. Pet. App. 9a. IGRA's section 2710(d)(7)(A)(ii), the court reasoned, provides for federal jurisdiction over a specifically defined set of claims: "cause[s] of action initiated by a State or Indian tribe to enjoin a class III gaming activity *located on Indian lands*." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). Because Michigan and Little Traverse alleged that the Vanderbilt facility was *not* located on Indian lands, their claims fell outside IGRA's limited jurisdictional grant.

Perhaps recognizing that its original claims did not fall within the plain language of IGRA, Michigan amended its complaint while the interlocutory appeal was pending, adding new claims under federal common law and state law and naming tribal officers as additional defendants. J.A. 118-36. Despite the fact that these claims were not part of

the case at the time of the preliminary injunction ruling, the court of appeals went on to consider them. Reasoning that Michigan's additional claims presented a significant question of federal law—namely, "whether the Vanderbilt casino is located on Indian lands"—the court of appeals found that they fell within 28 U.S.C. § 1331's grant of general federal question jurisdiction. Pet. App. 10a-11a.

Nevertheless, the court of appeals concluded that these claims suffered from a different flaw: they were barred by tribal sovereign immunity. Pet. App. 11a-17a. It rejected Michigan's argument that Congress abrogated Bay Mills' immunity through IGRA's section 2710(d)(7)(A)(ii), concluding that the provision's plain terms apply only for claims related to gaming *on* Indian lands. Pet. App. 13a. It also rejected Michigan's other abrogation arguments, Pet. App. 14a-15a, and dismissed Michigan's assertion that Bay Mills had waived tribal immunity as a "[t]endentious, junk-drawer" argument "best left out of a brief," Pet. App. 17a.

Having concluded that all of the Plaintiffs' claims against the tribe were barred either by a lack of subject matter jurisdiction or by tribal immunity, the court of appeals vacated the preliminary injunction. Pet. App. 18a. It declined to decide whether Michigan's newly added claims against tribal officers could go forward, leaving that question for the district court to decide in the first instance. Pet. App. 17a-18a.

Following the court of appeals' decision, Little Traverse advised the district court that it would file a motion to voluntarily dismiss its case. Dkt. 161.

Little Traverse declined to join Michigan in seeking this Court's review.

In addition to the pending amended complaint, a declaratory judgment suit filed by Bay Mills against Michigan Governor Rick Snyder is also pending in the Western District of Michigan. *See Bay Mills Indian Cmty.* v. *Snyder*, No. 1:11-cv-729-PLM (W.D. Mich.) (filed July 15, 2011). In that case, Bay Mills seeks a declaratory judgment that the Vanderbilt property *is* Indian land. Rather than permit that key issue to be determined, Governor Snyder, in an exercise of what some might call chutzpah, invoked state sovereign immunity as an affirmative defense. *See* Dkt. 7 in W.D. Mich. No. 1:11-cv-729-PLM. Dispositive motions have yet to be filed in that case.

Although no injunction is currently in place, Bay Mills has voluntarily refrained from reopening the Vanderbilt facility pending this Court's decision.

SUMMARY OF ARGUMENT

The curious starting point for Michigan's brief is that this case is about gaming activity on Indian lands—specifically, decisions made by tribal officials to approve the Vanderbilt facility. According to Michigan, that makes its complaint authorized by IGRA. The fundamental problem with this about-face assertion is that the argument is entirely outside the questions presented, each of which Michigan drafted to speak solely to gaming activities "*outside* of Indian lands." Pet. i (emphasis added). And even if this argument were properly before the Court, it is utterly lacking in factual and legal support. As the statute makes clear, a tribe's

decision to open a gaming facility is not itself a "class III gaming activity" under IGRA.

As to the first of the actual questions presented, Bay Mills agrees that were it not for Bay Mills' immunity, the district court would have had subject matter jurisdiction over Michigan's complaint. But the question is a red herring because Bay Mills *is* immune from suit. Tribal sovereign immunity is thus the appropriate focus of this case, and the Court should reject Michigan's suit on that ground.

Michigan's attempt to circumvent Bay Mills' sovereign immunity falls well short of its mark. Michigan argues that its claims can go forward because Congress abrogated tribal sovereign immunity in IGRA's section 2710(d)(7)(A)(ii). This argument ignores that provision's plain language. To the extent section 2710(d)(7)(A)(ii) abrogates tribal immunity at all, it applies only to suits concerning gaming "*on* Indian lands." Because the premise of Michigan's suit is that Bay Mills is conducting gaming *off* Indian lands, Michigan has simply pled itself out of court.

Facing statutory text that directly contravenes its abrogation argument, Michigan and its amici fall back on arguments that the Court should create various exceptions to the doctrine of tribal sovereign immunity. But this Court has already rejected each of the proposed exceptions. Michigan accordingly pleads for this Court to overrule its immunity precedents. Again, however, this Court has already rejected such pleas—twice in the past twenty-five years. As this Court has emphasized, it is Congress's prerogative, not the Court's, to alter the doctrine of tribal sovereign immunity if it sees fit to do so. Yet

Congress has done just the opposite: it has repeatedly reaffirmed the doctrine and has rejected broad efforts to limit it. The historical roots of tribal sovereign immunity only reinforce Congress's considered judgment. Contrary to Michigan's claim, tribal immunity has deep roots in this country's jurisprudence. There is no justification for the Court to unilaterally abrogate the doctrine now.

Despite Michigan's suggestion that affirming the decision below will leave the state remedy-less, affirmance will do no such thing. Most obviously, Michigan can invoke the dispute resolution procedure that it bargained for in its gaming compact with Bay Mills. Michigan and other states also have a wide range of other dispute resolution mechanisms at their disposal, from negotiated waivers of sovereign immunity to *Ex parte Young* suits against tribal officials. Michigan's dissatisfaction with those remedies provides no warrant for this Court to usurp Congress's role.

ARGUMENT

I. THIS CASE DOES NOT PRESENT THE QUESTION OF THE DISTRICT COURT'S AUTHORITY TO ENJOIN A GAMING ACTIVITY *ON* INDIAN LANDS.

Michigan opens its brief in a surprising fashion: It claims that its lawsuit can go forward under 25 U.S.C. § 2710(d)(7)(A)(ii) because the tribe's decisions to open and license the Vanderbilt casino were "class III gaming activities" that took place "on" Indian lands. Pet. Br. 20. This argument is flatly outside the scope of the questions Michigan asked this Court to review. And that is not all: the new

argument lacks factual support because it was not made in the district court and misconstrues IGRA.

Section 2710(d)(7)(A)(ii), on which Michigan relies, provides:

> The United States district courts shall have jurisdiction over—
>
> * * *
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect[.]

25 U.S.C. § 2710(d)(7)(A)(ii).

As the court of appeals recognized, Michigan's claims fall outside the scope of this provision precisely because Michigan's theory is that gaming activity is taking place *outside* of Indian lands. Pet. App. 61a. In a late-breaking effort to conform its legal theory to its flawed claim, Michigan now asserts that it is actually seeking to "enjoin a class III gaming activity located *on* Indian lands." Pet. Br. 21. According to Michigan, the tribe's "decision to own and operate the Vanderbilt casino" constitutes "a class III gaming activity" for purposes of section 2710(d)(7)(A)(ii). Pet. Br. 20. And those actions, Michigan contends, must have "necessarily occurred 'on Indian lands.' " Pet. Br. 21.

However interesting this question may be, Michigan drafted the questions presented in a way that precludes this Court from considering it. Michigan began its Petition with the statement that

"[t]his dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino *off* of Indian lands." Pet. i (emphasis in original). And it then asked the Court to decide "[w]hether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place *outside* of Indian lands" and "[w]hether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA *outside* of Indian lands." *Id.* (emphases added). Neither of those questions implicates disputes about activity "*on* Indian lands."

This Court's rules make clear that only "the questions set out in the petition, or fairly included therein," will be considered by the Court. S. Ct. R. 14(1)(a); *see* S. Ct. R. 24.1(a) (merits brief "may not raise additional questions or change the substance of the questions already presented"). Michigan's new theory is not merely outside the questions presented; it is directly antithetical to them. The Court should thus decline to address this new theory.

Even if Michigan's argument could be shoehorned into the questions presented, the Court would not be in a position to rule on it. This Court does not engage in factfinding; nor is it a court of first impression. Michigan did not raise this argument in the district court in its complaint or preliminary-injunction papers, so no factual record on any of the relevant points was developed there. As a result, Michigan is left to simply assert that the authorization and licensing decisions must have occurred on Indian lands because the Council "derives its governmental authority from its reservation." Pet. Br. 21. The Court should decline

to address a factually undeveloped argument that is based on speculation and supposition.

Even more importantly, Michigan's new theory lacks merit. It completely misconstrues IGRA. The Executive Council's decisions are not "class III gaming activities" within the meaning of IGRA. IGRA defines "Class III gaming" as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). And the definitions of "class I gaming" and "class II gaming" demonstrate that the phrase "forms of gaming" encompasses only the games themselves. *See id.* § 2703(6) ("The term 'class I gaming' means social games * * *."); § 2703(7)(A)(i) ("The term 'class II gaming' means * * * the game of chance commonly known as bingo."). "Class III gaming activities" are thus exactly what they sound like: the activities of playing the particular games that fall within "class III."

Further, the term "class III gaming activity" appears multiple times throughout the statute, often in contexts that indicate that it does not encompass tribal management or regulation. For example, one provision refers to the "licensing and regulation" of a class III gaming activity. 25 U.S.C. § 2710(d)(3)(C). Another refers to the "operation of a class III gaming activity." *Id.* § 2710(d)(9). And a third specifies the fees that must be paid "by each gaming operation that conducts a class II or class III gaming activity." *Id.* § 2717(a)(1). Other provisions refer to "class III gaming activity" in a similar manner. *See, e.g.*, 25 U.S.C. § 2710(b)(2)(A), (b)(4), (c)(4). These provisions and others would make no sense if a "gaming activity" included the licensing and regulation of gaming.

Michigan's argument is procedurally barred and wrong. It should be rejected.

II. BAY MILLS AGREES THAT THE DISTRICT COURT WOULD HAVE HAD SUBJECT MATTER JURISDICTION IF NOT FOR BAY MILLS' IMMUNITY.

The court of appeals correctly held that any grant of subject matter jurisdiction contained in section 2710(d)(7)(A)(ii) of IGRA—like any abrogation of tribal immunity therein, *see infra* Part III—is limited to suits challenging gaming activity on Indian lands. But Bay Mills recognizes that IGRA is not the only possible source of subject matter jurisdiction in this case. Michigan has asserted that the general federal question statute, 28 U.S.C. § 1331, provides jurisdiction. Bay Mills agrees that, but for Bay Mills' sovereign immunity, the district court could have properly exercised jurisdiction under 28 U.S.C. § 1331. Pet. App. 10a-11a; Pet. Br. 18.

Were it not for tribal sovereign immunity, Michigan's complaint, at least after amendment, would fit within familiar jurisdictional precepts. The federal common law claim, for instance, "arises under" federal law and supports the exercise of federal question jurisdiction. *See National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985); *Illinois* v. *Milwaukee*, 406 U.S. 91, 100 (1972). Michigan's IGRA claim "arises under" federal law too, since it is " 'drawn so as to claim a right to recover under' " a federal statute. *Jackson Transit Auth.* v. *Local Div. 1285*, 457 U.S. 15, 21 n.6 (1982) (citation omitted). And the remaining claims "form part of the same case or controversy," likely bringing them within the district court's

supplemental jurisdiction. 28 U.S.C. § 1367(a). Nothing in IGRA demonstrates an intent to withdraw subject matter jurisdiction that otherwise exists under sections 1331 and 1367. *Cf. Verizon Md. Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643-44 (2002).

To be sure, the existence of subject matter jurisdiction does not mean that Michigan has stated a claim for relief or that Michigan possesses a private right of action to bring any properly pleaded claims. It is far from clear, for example, that Michigan has stated a cognizable federal common law claim. Nor is it clear that Michigan's allegations establish a "violation" of IGRA or the gaming compact. Even if Michigan could identify such a violation, it may have no right to file a complaint to enjoin that violation. *See In re Sac & Fox Tribe of Miss.*, 340 F.3d 749, 766 (8th Cir. 2003) ("IGRA provides no *general* private right of action"). And in any event, any viable claims are barred by Bay Mills' sovereign immunity. *See infra* Part III.

The first question before the Court, however, is just whether the district court had jurisdiction over this suit. And as to that the parties agree: Were it not for tribal immunity, the district court would have had federal question jurisdiction over at least some of Michigan's claims and supplemental jurisdiction over the others. This case thus hinges on sovereign immunity, not federal jurisdiction.[3]

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[3] Of course, this Court need not address federal question jurisdiction to resolve this case on immunity grounds. This Court, like all federal courts, has leeway " 'to choose among

III. BECAUSE MICHIGAN'S CLAIMS DO NOT FALL WITHIN THE PLAIN LANGUAGE OF SECTION 2710(d)(7)(A)(ii), BAY MILLS IS IMMUNE FROM THIS SUIT.

This Court recognized in *Kiowa* that it is "settled law" that an Indian tribe cannot be sued in federal court without its consent. 523 U.S. at 756. This immunity extends to all claims against a tribe, regardless of the character and location of the underlying conduct. *Id.* at 754-55. Only two exceptions exist to the broad rule of immunity. One is that a tribe may waive its immunity, and the second is that Congress may abrogate a tribe's immunity. *Id.* at 754. In either case, the dissolution of tribal immunity must be unequivocally expressed. *C&L Enterprises, Inc.* v. *Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001).

Neither exception applies here. Michigan does not contend that Bay Mills has waived its immunity. It argues only that Congress abrogated Bay Mills' immunity as to its particular claims in IGRA's section 2710(d)(7)(A)(ii). In making this argument, Michigan skips over the question whether section 2710(d)(7)(A)(ii) is actually an abrogation of tribal sovereign immunity for *any* claims, which is far from

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threshold grounds for denying audience to a case on the merits.' " *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citation omitted). And sovereign immunity is just such a threshold ground. *See, e.g., Kiowa*, 523 U.S. at 754; *Henderson* v. *United States*, 517 U.S. 654, 675 (1996).

clear-cut.[4] But even if section 2710(d)(7)(A)(ii) abrogates tribal sovereign immunity in some circumstances, that abrogation clearly does not apply here. Michigan's claims fall squarely outside the statute's plain terms—and therefore outside the scope of any possible abrogation. Bay Mills retains its immunity from suit.

1. Congress, of course, is free to set the terms of any abrogation of tribal immunity. This Court's task is to apply the " 'traditional tools of statutory construction' " to determine what Congress intended.

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[4] *Seminole Tribe* held that Congress intended to abrogate state sovereign immunity in a neighboring provision—section 2710(d)(7)(A)(i)—because that provision clearly identifies the state as the defendant in suits under it. 517 U.S. at 57. By doing so, Congress necessarily signaled that the state's sovereign immunity should not bar such suits. *Id.* Section 2710(d)(7)(A)(ii), however, stands on different analytical footing. Unlike romanette (i), romanette (ii) does not specify the defendant at all; it simply permits certain plaintiffs (tribes and states) to seek injunctions against "gaming activity located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). Although tribes can certainly be named as defendants in suits under romanette (ii), so can tribal officials, states, local governments, and corporations. *See, e.g.*, *Coeur d'Alene Tribe* v. *State*, 842 F. Supp. 1268, 1282 (D. Idaho 1994) (suit to enjoin state from operating lotteries on Indian reservation). Tribes are thus merely one of several "logical defendants," which this Court has held is not enough to abrogate immunity. *Dellmuth* v. *Muth*, 491 U.S. 223, 232 (1989). Because evidence of congressional intent to abrogate immunity "must be both unequivocal and textual," a mere "permissible inference" that a sovereign *could* be sued does not meet that demanding standard. *Id.* at 230, 232.

FAA v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (citation omitted). Magic words are not necessary, but the scope of the abrogation must be "clearly discernible from the statutory text in light of traditional interpretive tools." *Id.* Any ambiguity on that score is construed in favor of the sovereign—here, the tribe. *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); *see also C&L Enterprises*, 532 U.S. at 418 ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." (citing *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 58 (1978))).

The precision of the language in section 2710(d)(7)(A)(ii) is striking. It does not create a general cause of action for any "violation" of IGRA. Nor does it authorize suit whenever a tribe or state fails to abide by the terms of a gaming compact. Instead, Congress identified a very specific kind of claim: a "cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact * * * that is in effect." 25 U.S.C. § 2710(d)(7)(A)(ii).

The fundamental theory of Michigan's complaint, of course, is that Bay Mills is running a gaming facility on land that is *not* "Indian land." But as Michigan seems to concede, Pet. Br. 19, section 2710(d)(7)(A)(ii) itself forecloses any application to claims arising out of activity conducted outside of Indian land. Congress established a carefully balanced judicial remedy with a number of limitations: states and tribes are the only permissible plaintiffs; an injunction is the only permissible remedy; the object of the injunction must be class III gaming activity; the gaming must

contravene a tribal-state compact; and the gaming must be conducted "*on Indian lands.*" 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added); *see also* Pet. App. 7a. Any abrogation of tribal immunity is delineated by these precise terms.

The "on Indian lands" limitation was no accidental insertion. IGRA as a whole is exclusively focused on gaming that takes place on Indian lands. After this Court confirmed in *Cabazon* that states have limited authority to regulate gaming on Indian lands, Congress established a federal regulatory regime for that specific type of gaming. The statute's core provision makes that clear enough: Class III gaming activities "*shall be lawful on Indian lands*" if, but only if, the statutory requirements are met. 25 U.S.C. § 2710(d)(1) (emphasis added). IGRA simply does not address the lawfulness of class III gaming—or any other type of gaming for that matter, *see id.* § 2710(a)—that takes place outside of Indian lands. Such gaming is, and has always been, subject to state law. *See Wagnon*, 546 U.S. at 113; *Hicks*, 533 U.S. at 362. Because IGRA itself is narrowly focused on Indian lands, it is entirely unsurprising that its remedial provision, section 2710(d)(7)(A)(ii), would be similarly focused.

An episode from Michigan's own gaming history illustrates the significance of the "Indian lands" limitation. After Michigan's voters approved casino gambling in 1996, the city of Detroit became eligible to issue three casino licenses. *Lac Vieux Desert Band v. Mich. Gaming Control Bd.*, 172 F.3d 397, 400-01 (6th Cir. 1999). One of those licenses went to the Sault Ste. Marie Tribe of Chippewa Indians, who subsequently opened a casino in downtown Detroit.

The casino was licensed by the state, and its operation was governed by state law, not IGRA. Surely Congress would not have intended for section 2710(d)(7)(A)(ii) to be used to enjoin the casino's operation simply because it happened to be owned by an Indian tribe. IGRA was intended to promote "tribal economic development, self-sufficiency, and strong tribal governments" by authorizing gaming *within* Indian country. 25 U.S.C. § 2702(1). It did not intend to place tribes under special disabilities *outside* Indian country.

2. Undeterred by the plain import of section 2710(d)(7)(A)(ii), Michigan tries to draw support from IGRA's criminal provision, codified at 18 U.S.C. § 1166. That provision assimilates state gambling laws into federal law within Indian country, 18 U.S.C. § 1166(a), makes violation of those laws a federal offense, *id.* § 1166(b), and gives the United States "exclusive jurisdiction" to prosecute such violations, *id.* § 1166(d). Michigan construes this provision as implicit authorization for its lawsuit. According to Michigan, section 1166 authorizes states to "bring a civil suit to enforce anti-gambling laws in Indian country." Pet. Br. 26. It then reasons that because states generally have more authority over "sovereign state lands" than over Indian lands, the "reasonable inference" is that Congress "expected states to bring civil actions" to enjoin gaming outside Indian lands as well. *Id.*

Michigan's logic is highly suspect. The "best evidence of Congress's intent is the statutory text." *NFIB* v. *Sebelius*, 132 S. Ct. 2566, 2583 (2012) (opinion of the Court). And in this case the text says nothing about gaming outside Indian lands.

Self-serving appeals to what Congress "surely" intended, *see* Pet. Br. 41, cannot substitute for what Congress actually said.

In any event, the premise of Michigan's argument is incorrect. Congress did *not* authorize states to "bring a civil suit to enforce anti-gambling laws in Indian country." Section 1166 extends state gambling laws into Indian country only "for purposes of Federal law." 18 U.S.C. § 1166(a). It is a classic assimilative act that creates new federal crimes and gives the *federal* government exclusive prosecutorial authority. Indeed, Michigan's own Supreme Court has confirmed that understanding (at the behest of Michigan's attorney general, no less). *See Taxpayers of Mich. Against Casinos* v. *State*, 685 N.W.2d 221, 229 (Mich. 2004) ("Section 1166 does *not* grant the state regulatory authority over tribal gaming; rather, it simply incorporates state laws as the federal law governing nonconforming tribal gaming."); *see also, e.g.*, *United States* v. *E.C. Invs., Inc.*, 77 F.3d 327 (9th Cir. 1996).

Construing section 1166 as a broad extension of state civil jurisdiction over Indian country would defeat IGRA's careful allocation of jurisdiction among tribes, the federal government, and states. Congress assuredly did not intend to effect a dramatic shift in tribal-state relations through this minor provision. As this Court has observed, Congress does not typically "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). The Senate committee report confirms this point: IGRA does not "contemplate the extension of State jurisdiction or the application of State laws" to conduct in Indian

country, other than through the compact process. S. Rep. No. 100-446, at 6 (1988).

3. Michigan is thus left with no textual hook for its expansive reading of section 2710(d)(7)(A)(ii). So it resorts to a purportedly "holistic" portrayal of congressional purpose and common sense. It "makes no sense," Michigan argues, "to interpret the phrase 'on Indian lands' as a limitation on access to federal courts when gaming occurs *outside* Indian lands." Pet. Br. 27. According to Michigan, Congress surely did not intend "to give states a greater ability to deal with illegal Indian gaming *on* Indian lands than *off* of Indian lands." *Id.* at 28.

This argument misses the point. IGRA's "on Indian lands" language is not, as Michigan puts it, "a limitation on access to federal courts when gaming occurs *outside* Indian lands." Pet. Br. 27. IGRA no more imposes a bar on such suits than it abrogates immunity for them. The statute simply has nothing to do with activity that takes place outside Indian lands. With respect to such activity, it leaves the background rules untouched. And one of those background rules is tribal sovereign immunity. *See Kiowa*, 523 U.S. at 756.

In the end, Michigan seeks to "divin[e] what Congress would have wanted if it had thought of the situation before the court." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010). Although IGRA says nothing about gaming activity alleged to take place outside Indian lands, Michigan believes Congress surely would not have wanted tribal sovereign immunity to bar state suits challenging such activity. But courts are not in the business of speculating about congressional intent when

sovereign immunity is at stake. That is exactly the point of the clear statement rule. *Cf. id.* In the absence of any indication to the contrary, Bay Mills thus retains its traditional immunity from suits outside the scope of section 2710(d)(7)(A)(ii).

4. Apparently recognizing the weakness of its abrogation argument in light of the statute's plain language, Michigan asks the Court to "consider overruling" the requirement of an "unequivocal expression" of intent to abrogate tribal immunity. Pet. Br. 30. The state attempts to cast this clear statement rule as some sort of unjustified jurisprudential anomaly. Acknowledging that a similar standard applies to abrogations of state and federal sovereign immunity, Michigan claims that those doctrines are distinguishable because they stem from the Constitution or implicate relations among the branches of government. Pet. Br. 30-32. According to Michigan, the Court should overrule precedent and adopt a more lenient (and mushy) abrogation standard for tribal sovereign immunity. Pet. Br. 31 (advocating that statutes affecting tribal immunity be interpreted "in the same manner as any other statute that affects the common law").

That proposal would upend decades of settled precedent. It would also undermine the "stable background against which Congress can legislate with predictable effects." *Morrison*, 130 S. Ct. at 2881. And if those are not reason enough to reject the suggestion—particularly where this Court has made clear that Congress is squarely in the driver's seat when it comes to tribal sovereign immunity, *see Kiowa*, 523 U.S. at 758-60—Michigan's argument is also wrong. Clear statement rules are not unique to

constitutionally based immunity doctrines like state sovereign immunity. The Court has long applied a clear statement rule to a wide variety of *common law* immunities, including federal sovereign immunity, *e.g.*, *United States* v. *King*, 395 U.S. 1, 4 (1969); foreign sovereign immunity, *e.g.*, *The Schooner Exchange* v. *McFaddon*, 11 U.S. 116, 137 (1812); territorial immunity, *e.g.*, *People of Porto Rico* v. *Rosaly y Castillo*, 227 U.S. 270, 276-77 (1913); and official immunity, *e.g.*, *Pulliam* v. *Allen*, 466 U.S. 522, 529 (1984). Requiring a clear expression of Congress's intent to abrogate tribal immunity is thus hardly anomalous.

Even outside the immunity context, the Court has always required a clear statement of congressional intent before construing a statute in derogation of the common law or other longstanding norms. *See, e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Thus, even Michigan's contention that laws affecting tribal immunity should be interpreted "in the same manner as any other statute that affects the common law" could not advance its argument. Michigan would still have to identify a clear statement of intent to alter the background presumption of tribal sovereign immunity. And Section 2710(d)(7)(A)(ii) contains *no* indication—clear or otherwise—that Congress intended to abrogate tribal sovereign immunity with respect to claims like Michigan's involving gaming the state asserts is occurring outside of Indian lands. That alone provides grounds for affirmance.

IV. THIS COURT SHOULD REJECT MICHIGAN'S PLEA TO OVERRULE LONGSTANDING PRECEDENT REGARDING THE SCOPE OF TRIBAL IMMUNITY.

Michigan's final attempt to overcome Bay Mills' sovereign immunity is to implore this Court to disavow long-settled precedent and create a categorical exception to immunity by judicial fiat. The exception Michigan proposes would not only contravene established law, it would also defy principled application even in this case. The categorical exception to tribal immunity suggested by the amici states fares no better. As the Court has done repeatedly when asked to narrow tribal immunity, it should reject Michigan's position as contrary to longstanding and well-founded precedents.

A. Michigan's Claims Are Squarely Foreclosed By Settled Doctrine.

The doctrine of tribal sovereign immunity bars all claims against an unconsenting tribe, regardless of the character and location of the underlying conduct. Michigan's claims fall squarely within the contours of this settled doctrine. And Michigan knew this when it entered the compact at issue here, as the explicit terms of the compact make clear. Pet. App. 90a ("Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity."). Michigan and its amici now attempt to argue that a decision in Bay Mills' favor would amount to an "exten[sion]" of tribal sovereign immunity, Alabama Br. 8, and an

exercise in judicial activism. But in fact, the Court has already rejected each of the limitations they propose. Michigan and its amici are asking the Court to overrule these past decisions. As the Court has repeatedly emphasized, if decades of settled expectations are to be undermined, Congress—not the Court—should be the branch of government to do so.

Michigan and its amici purport to identify a laundry list of exceptions to the doctrine of tribal sovereign immunity. Michigan argues that the doctrine does not apply to claims involving off-reservation conduct and/or claims involving commercial activity and/or non-contract claims. Pet. Br. 36-42. The Alabama amici add that the doctrine does not apply to claims for injunctive relief. Alabama Br. 9-11. According to Michigan and its amici, this Court has not yet applied tribal immunity in any of these circumstances.

This argument is founded on a grossly misleading portrayal of this Court's decisions. In *Kiowa*, for example, this Court squarely rejected Michigan's proposed limitations. Just like Michigan, the respondent in that case argued that tribal immunity should be "confine[d] * * * to reservations or to noncommercial activities." 523 U.S. at 758. The Court disagreed. It observed that previous decisions had not drawn those proposed distinctions, *id.* at 754-55, and held that adopting them would contravene settled law, *id.* at 758-60. The Court therefore chose to adhere to its precedents and "defer to the role Congress may wish to exercise in this important judgment." *Id.* at 758. The Court later reaffirmed that very holding in another case

involving off-reservation commercial conduct. *See C&L Enterprises*, 532 U.S. at 418.

Michigan attempts to characterize *Kiowa* as "only a narrow, contract-based ruling," Pet. Br. 37, and thus not relevant to resolving immunity in a non-contract case. *Id.* at 38. That is a peculiar contention given the facts of this case. Michigan's core claim is that Bay Mills breached its agreement with the state to operate class III gaming only on Indian land. Pet. App. 58a-61a. And IGRA makes clear that this kind of claim is "for breach of contract." 25 U.S.C. § 2710(d)(3)(C)(v). The tribal-state compact is a special type of contract, to be sure; but it is still a contract, and this dispute is "contract-based." Pet. Br. 37. Michigan's proposed carve out for non-contract claims therefore flounders even on its own terms.

In any event, this Court has *already* applied the doctrine of tribal immunity to a non-contract suit involving off-reservation commercial activity. *Puyallup Tribe, Inc.* v. *Department of Game of Washington* involved a tribe whose members engaged in commercial fishing "both on and off its reservation." 433 U.S. 165, 167 (1977); *see also Puyallup Tribe* v. *Dep't of Game*, 391 U.S. 392, 396 (1968) ("These Indians fish not only for their own needs but commercially as well, supplying the markets with a large volume of salmon."). A state court entered an injunction against the tribe and some of its members limiting the number of fish that could be caught and requiring the tribe to make certain reports about its members. 433 U.S. at 172. This Court held that "the portions of the state-court order that involve relief against the Tribe itself must

be vacated in order to honor the Tribe's valid claim of immunity." *Id.* at 173. Michigan's uncharitable interpretation of *Kiowa* as a "narrow, contract-based ruling" is thus foreclosed by *Puyallup*. Michigan's failure to mention *Puyallup* at all is particularly perplexing given the case's prominence in the *Kiowa* opinions. *See* 523 U.S. at 754-55 (opinion of the Court); *id.* at 762-63 (Stevens, J., dissenting).

Michigan's amici purport to identify a different gap in this Court's tribal immunity precedents. In their view, no decision has yet "held that tribal immunity bars an action by a State for declaratory and injunctive relief." Alabama Br. 6. But that is precisely what *Puyallup* held. *See* 433 U.S. at 172-73. (Like Michigan, its amici entirely fail to mention *Puyallup*.) Moreover, as the amici seem to recognize, this Court held again in *Oklahoma Tax Commission* v. *Citizen Band, Potawatomi Indian Tribe of Oklahoma* that tribal sovereign immunity barred a state counterclaim for injunctive relief. *See* 498 U.S. 505, 507-08, 510 (1991). And *Santa Clara Pueblo* v. *Martinez* also involved a claim for injunctive relief, though the plaintiff in that case was an individual rather than a state. 436 U.S. 49, 58 (1978).

Amici note that the Fifth Circuit found in *TTEA* v. *Ysleta del Sur Pueblo* that tribes could be sued for injunctive relief. 181 F.3d 676, 680-81 (5th Cir. 1999). But that decision simply misapplied *Ex parte Young*, which permits suits against state *officers* but not state *governments*. *See id.* Just as the immunity of the states does not turn on the type of relief sought, *see Seminole Tribe*, 517 U.S. at 58, neither does the immunity of tribes. The amici's purported exception for injunctions, like Michigan's supposed

exceptions, is wishful thinking, foreclosed by this Court's precedent.

B. There Is No Basis For Overruling This Court's Immunity Precedents.

Recognizing the futility of its arguments under settled precedent, Michigan ultimately falls back on a plea for the Court to "adjust" that precedent. Pet. Br. 40; *see also* Oklahoma Br. 15 (urging the Court to "modify" its doctrine). But this Court has rejected the very same plea before—*twice* since 1990. Michigan and its amici are simply rehashing the same tired arguments.

1. As this Court confirmed in *Kiowa*, tribal sovereign immunity is "settled law." 523 U.S. at 756. Congress, the executive branch, and the federal courts have all recognized and reaffirmed the doctrine of tribal sovereign immunity countless times. This Court has applied the doctrine no fewer than seven times since 1940. *See C&L Enterprises*, 532 U.S. at 418; *Kiowa*, 523 U.S. at 760; *Oklahoma Tax Comm'n*, 498 U.S. at 510; *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877, 890-91 (1986); *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup Tribe*, 433 U.S. at 173; *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940); *see also Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997); *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 781-82 (1991). The lower federal courts and state courts have done so hundreds more times. And this Court has not retreated from its unequivocal recognition of tribal immunity over 70 years ago, despite repeated requests to do so. *See infra* at 40-41.

The judiciary has not acted alone in this area. Congress and the executive branch have both ratified the doctrine of tribal sovereign immunity on numerous occasions. Congress has done so explicitly by endorsing the doctrine in statutes like the Indian Self-Determination and Education Assistance Act. That statute provides that nothing in it should be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 450n. This provision, and many others like it, "cannot be read except as a validation" of the doctrine of tribal sovereign immunity. *Franklin* v. *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72 (1992) (discussing congressional ratification of judge-made doctrine).[5]

Congress has also implicitly approved the doctrine by enacting laws that authorize only narrow categories of claims against Indian tribes, *see, e.g.*, Act of May 29, 1908, § 5, 35 Stat. 445, and by repeatedly rejecting broad efforts to limit tribal immunity, *see, e.g.*, 40 Cong. Rec. 1260 (Jan. 18, 1906) (rejecting amendment that would have authorized "any claim of any nature" against certain Indian tribes); Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law*, 37 Tulsa L. Rev. 661, 726-51 (2002) (describing a number of bills that were debated during the 105th Congress). Countless executive

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[5] Many other statutes contain similar references to tribal immunity. *See, e.g.*, 30 U.S.C. § 1733(a)(4); 30 U.S.C. § 1300(j)(3); 25 U.S.C. § 3746; 25 U.S.C. § 450f(c)(3); 25 U.S.C. § 81(d)(2); 18 U.S.C. § 2346(b)(2); 18 U.S.C. § 1716E(h)(2); 15 U.S.C. § 378(c)(1)(B).

branch regulations likewise recognize or affirm the doctrine.[6] This uniform, unwavering acknowledgement of tribal sovereign immunity by all three branches of our government puts the issue beyond dispute. *Cf. Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002).

2. Not only has the Court reaffirmed tribal sovereign immunity numerous times, it has affirmatively *rejected* efforts to limit tribal immunity. It first rebuffed such an effort in *Oklahoma Tax Commission*. Oklahoma argued that "tribal business activities * * * are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense in that context." 498 U.S. at 510. The Court, however, unanimously reaffirmed the doctrine. Chief Justice Rehnquist's opinion for the Court emphasized that "Congress has always been at liberty to dispense with * * * tribal immunity or to limit it," but has instead "consistently reiterated its approval of the immunity doctrine." *Id.* at 510. The Court accordingly chose to defer to Congress's judgment and declined "to modify the long-established principle of tribal sovereign immunity." *Id.*

Seven years later, the *Kiowa* respondent came to the Court with a similar argument. It sought to "confine [tribal immunity] to reservations or to noncommercial activities." 523 U.S. at 758. Although the *Kiowa* Court admitted to some doubt

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[6] *See, e.g.*, 42 C.F.R. §§ 136.118(a), 137.3(a), 137.310; 25 C.F.R. §§ 11.118(d), 44.102(a), 84.006(a)(2), 162.012(a)(4)(ii), 162.014(d), 273.1(d)(1), 900.4(a).

about "the wisdom of perpetuating the [tribal immunity] doctrine," it held that the time for unilateral judicial intervention had passed. *Id.* Congress, not the Court, is "in a position to weigh and accommodate the competing policy concerns and reliance interests" at stake in any decision to limit the doctrine of tribal immunity. *Id.* at 760. Accordingly, the Court declined to "revisit" its case law and deferred to Congress instead. *Id.* at 759-60.

Changing course on tribal sovereign immunity would be even less appropriate now than when this Court decided *Kiowa*. *Kiowa*'s holding was expressly reiterated several years later in *C&L Enterprises*. *See* 532 U.S. at 418. And since *Kiowa*, Congress has specifically considered—and rejected—legislation that would have significantly curtailed the scope of tribal immunity. *See, e.g.*, S. 1691, 105th Cong. (1998); *see also* Seielstad, *supra*, at 726-51. Congress was well aware of this Court's decision in *Kiowa* and chose not to overrule it. *See, e.g.*, S. 2299, 105th Cong. § 2(a)(1)-(2) (1998) (discussing *Kiowa*); S. 2302, 105th Cong. § 2(a)(1)-(3) (1998) (same). Congress's decision to stay its hand is not an invitation for this Court to act in its stead.

On the contrary, the principles of stare decisis have "special force" in a case such as this because Congress "remains free to alter" the rule of sovereign immunity to which this Court has long adhered. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989). The federal government, states, tribal governments, and private entities have all negotiated and structured their various contracts and arrangements around the settled law of tribal sovereign immunity. Overturning or limiting these

precedents now would dissolve that underpinning and force the parties to begin anew. When "the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision," this Court has always been hesitant to revisit its past decisions, "for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton* v. *S.C. Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991).

At bottom, Michigan and its amici misconceive this Court's role in developing the federal common law. They suggest the Court is free to refashion the "judge-made" doctrine of tribal sovereign immunity as it pleases. Pet. Br. 9. But that is not how common law decision making works. When this Court articulates a common law rule, it is not simply picking a policy that strikes the fancy of a majority of this Court. Instead, the Court follows the "practices of common law courts from the most ancient times": It attempts to "interweave" the policies established by the political branches with "the inherited body of common-law principles." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970); *see also, e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 27 (1990); *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, 206 (1978). That methodology points inexorably toward the proper result in this case. Courts have long recognized, and the political branches have long approved, the doctrine of tribal sovereign immunity. There is no warrant for upsetting that collective judgment merely because a minority of states are frustrated by the doctrine.

3. Precedent and respect for the judgment of coordinate branches are not the only reasons to reject Michigan's jumbled commercial-activity-outside-Indian-lands-except-for-contracts exception to tribal immunity. Michigan identifies no sound policy justification for adopting such a strange rule.

a. Borrowing from Justice Stevens' dissent in *Kiowa*, Michigan argues that the Court should make an exception to immunity for tribes' commercial activities because the federal government and foreign nations can be sued for some of their commercial activities. Pointing to this purported anomaly, Michigan asks why tribes should enjoy broader immunity than these other sovereigns. Pet. Br. 20; *see Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting). What Michigan refuses to acknowledge is that the political branches, not the judiciary, created this "anomaly" by specifically carving out exceptions to federal and foreign sovereign immunity. Congress has enacted statutes to permit suits against the federal government for breach of contract and certain other commercial activities. *See, e.g.*, 41 U.S.C. § 601. And the State Department overturned the "virtually absolute" judicial conception of foreign sovereign immunity and created a new commercial activity exception in 1952. *Verlinden BV* v. *Cent. Bank of Nigeria*, 461 US 480, 486-87 (1983). Congress later codified that exception in the Foreign Sovereign Immunities Act. *Id.* at 488; *see also Kiowa*, 523 U.S. at 759 (recounting this history).

The courts thus followed, rather than led, the political branches in limiting the doctrines of federal and foreign sovereign immunity. That approach

makes good sense. When considering sovereign immunity, Congress is capable of "address[ing] the issue by comprehensive legislation" and is better positioned "to weigh and accommodate the competing policy concerns." *Kiowa*, 523 U.S. at 759. Congress may of course draw the line wherever it chooses; it is free, in the exercise of its legislative powers, "to say 'this much and no more.'" *Miles*, 498 U.S. at 24. But this Court is "not free to go beyond those limits," strike out on its own, and craft a non-statutory exception to tribal sovereign immunity. *Id.* The fact that the political branches have specifically created commercial-activity exceptions to federal and foreign sovereign immunity while at the same time reaffirming tribal sovereign immunity without any such exceptions counsels particular caution by the judicial branch.

A commercial-activities exception also makes little sense as a matter of theory or policy. Tribal sovereign immunity is intended in part "to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development.'" *Oklahoma Tax Comm'n*, 498 U.S. at 510 (citation omitted). Tribes' commercial activities, of course, are key to their "economic development."

Moreover, Michigan does not explain how courts are supposed to distinguish tribes' commercial activities from their governmental activities. As this Court's foreign sovereign immunity cases illustrate, this distinction is often not self-evident. *See, e.g.*, *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992); *cf. Gonzalez* v. *Raich*, 545 U.S. 1, 59 (2005)

(Thomas, J., dissenting) (challenging the prevailing understanding of "commerce"). The difficulty is exacerbated in the tribal context, for tribes—unlike sovereigns with significant tax bases—must rely on commercial activity to support their *governmental* functions. *See Cabazon*, 480 U.S. at 218-19 ("The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services."). And Michigan's proposed exemption of commercial contracts from its commercial-activity exception would only further frustrate judicial application. Indeed, this very case is based on Michigan's compact with Bay Mills, but it apparently would not fall within the exemption for contract claims that Michigan proposes.

b. Michigan's proposed exception for activity that takes place off Indian lands would be even more difficult to apply in practice. Michigan's own brief before this Court unwittingly demonstrates the problem. In one section, Michigan argues that "it is obvious" that the relevant gaming activity took place off Indian lands in the "brick-and-mortar" Vanderbilt facility. Pet. Br. 38. But earlier in its brief, it argued that the relevant gaming activity actually took place on Indian lands. Pet. Br. 20-21. If Michigan cannot even answer the on-or-off lands question in its one-sided merits brief, it is very hard to see how courts could reach principled decisions about the scope of tribal immunity in future cases.

c. Michigan's amici's proposed exception for injunctive relief, though perhaps easier to apply, has nothing else to recommend it. It would not even resolve this case, for Michigan's amended complaint

seeks forfeiture of Bay Mills' gaming revenues in addition to injunctive relief. *See* Pet. App. 56a, 70a. Moreover, allowing states to seek injunctive relief against tribes would undermine one of the principal functions of tribal sovereignty: protecting tribes from the states. *See Three Affiliated Tribes*, 476 U.S. at 890-91; *cf. Worcester* v. *Georgia*, 31 U.S. 515 (1832). Tribal sovereign immunity is "not subject to diminution by the States," *Kiowa*, 523 U.S. at 756, and this Court should once again reject the states' effort to diminish the rights of their fellow sovereigns.

4. It bears noting that this case does not involve a tort victim or other plaintiff that did not freely choose to deal with a tribal sovereign. Such cases may present special policy considerations, if not special doctrinal considerations. *Cf. Kiowa*, 523 U.S. at 758. For that reason, many tribes have chosen to waive their immunity in tort cases. *See* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 157-61 & n.141 (2004). Indeed, as a matter of policy, Bay Mills has never rejected a personal injury claim on sovereign immunity grounds.

In contrast to an unwitting tort victim, Michigan knew precisely what it was getting into when it entered into a gaming compact with Bay Mills. It could have bargained for additional "remedies for breach of contract." 25 U.S.C. § 2710(d)(3)(C)(v). Indeed, it *did* bargain for one such remedy: the compact's arbitration provision. *See* Pet. App. 89a-90a. Unlike many other states, however, Michigan did not obtain a waiver of the tribe's sovereign immunity in its negotiations with the tribe. *Cf. infra*

at 55 (discussing sovereign immunity waivers in other gaming compacts). Its newfound dissatisfaction with the compact for which it negotiated is no basis for overturning settled precedent.

C. Tribal Sovereign Immunity Has Deep Roots In Our Legal Tradition.

In a final effort to escape the force of controlling precedent, Michigan and its amici seize on dicta in *Kiowa* to attack the provenance of tribal sovereign immunity. *See* 523 U.S. at 756-57 (suggesting that tribal immunity "developed almost by accident" when a remark in *Turner* v. *United States*, 248 U.S. 354 (1919), became an explicit holding in *U.S. Fidelity & Guaranty*). From this, they argue that the doctrine's happenstance beginning undermines its vitality and leaves the Court free to amend or reshape it to accommodate the states' current policy concerns.

That argument glosses over the actual holding in *Kiowa*. The Court categorically reaffirmed the doctrine of tribal immunity—and ruled for the tribe—notwithstanding its questions about the doctrine's origins. *Id.* at 760. If Michigan were correct that the Court could freely revisit settled law, *Kiowa*'s holding might have been different. And in any event, the premise of Michigan's argument is wrong. Tribal sovereign immunity did not suddenly blossom in 1940 from an inadvertent seed planted in 1919. The doctrine was first judicially recognized in the late nineteenth century, and its roots extend far deeper than even that.

This Court has always recognized that Indian tribes have many of the characteristics of independent sovereigns. *See, e.g.*, *Worcester*, 31 U.S.

at 558; *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 16 (1831). Modern-day Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 851 (1985). Although they no longer possess " 'the full attributes of sovereignty,' " *Santa Clara Pueblo*, 436 U.S. at 55 (citation omitted), they still retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); *see* Cohen § 1.03 (discussing inherent tribal sovereignty).

Tribal sovereign immunity follows naturally from the premise of tribal sovereignty. Immunity from judicial process has long been recognized an "an incident of sovereignty." *Bonner* v. *United States*, 76 U.S. 156, 159 (1869). As Alexander Hamilton wrote in Federalist 81, it is "inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The Federalist No. 81, p. 508 (Henry Cabot Lodge ed. 1888) (emphasis omitted). This "established principle of jurisprudence in all civilized nations," *Beers* v. *Arkansas*, 61 U.S. 527, 529 (1858), has long been held to bar suits against a broad variety of sovereigns. It applies to suits against states in federal court, where immunity is constitutionally mandated. And it applies in a number of non-constitutional contexts as well, including suits against the federal government, *e.g.*, *United States* v. *Thompson*, 98 U.S. 486, 489 (1879), suits against territorial governments, *e.g.*, *Rosaly y Castillo*, 227 U.S. at 273-74, suits against foreign nations, *e.g.*, *The Schooner Exchange*, 11 U.S. at 136-37; and suits

against states in the courts of sister states, *e.g.*, *Paulus* v. *South Dakota*, 227 N.W. 52, 55 (N.D. 1929). Just as these other immunities arise from the nature of sovereignty itself, tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890.

Courts recognized the doctrine of tribal sovereign immunity long before *U.S. Fidelity & Guaranty*. *See generally* William Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587, 1640-54 (2013) (discussing early tribal immunity cases). For example, this Court's decision nearly a century earlier in *Parks* v. *Ross*, 52 U.S. 362 (1851), suggests a judicial assumption of tribal immunity. That case involved a claim for breach of contract against the legendary Cherokee chief John Ross. Ross had been responsible for hiring wagons in his official capacity as superintendent of the Cherokees' westward migration. *Id.* at 373. Ross was sued for the balance allegedly owed on one of the wagon contracts. *Id.* at 374. This Court rejected the claim, based in part on the general rule that an agent is not responsible for the debts of his principal, but also based on its conclusion that Ross was immune from the Circuit Court's process. The Cherokees, the Court observed, are "in many respects a foreign and independent nation," "governed by their own laws and officers, chosen by themselves." *Id.* Although they are ultimately under the guardianship of the United States, the federal government "has delegated no power to the courts of this District to arrest the public representatives or agents of Indian nations, who may be casually within their local jurisdiction, and

compel them to pay the debts of their nation * * *." *Id.*

Parks thus recognized that Ross enjoyed a type of official immunity by virtue of his public office. And that conclusion strongly suggests the existence of tribal sovereign immunity. For as Chief Justice Marshall recognized long ago, the immunities enjoyed by public officials are an outgrowth of the "perfect equality and absolute independence of sovereigns." *The Schooner Exchange*, 11 U.S. at 137-39 (discussing head of state immunity and diplomatic immunity); *see also Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2290-91 (2010). And so by recognizing that Ross's role as a "public representative[ ]" of the Cherokee Nation gave him a privilege against judicial "arrest," 52 U.S. at 374, the Court strongly suggested that the tribe itself would have enjoyed the same immunity from compulsory process.

Other nineteenth century cases confirm tribal immunity's strong pedigree. *See, e.g., Thebo* v. *Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895). In 1889, Congress established a Circuit Court for "Indian Territory" and assigned appellate jurisdiction to the Court of Appeals for the Eighth Circuit. Act of March 1, 1889, 25 Stat. 783. Thebo brought an action against the Choctaw Tribe in the new Circuit Court to recover fees for services rendered. 66 F. at 373. The lower court dismissed for lack of jurisdiction, and the court of appeals affirmed. In terms that mirror subsequent Supreme Court decisions, the Eighth Circuit held that "no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the

Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case." *Id.* at 375. Because Congress had not expressly authorized Thebo's suit, it was properly dismissed. *Id.* at 376.

The Eighth Circuit repeated its holding thirteen years later, noting that "the tribes would soon be overwhelmed with civil litigation and judgments" if their immunity were disregarded. *Adams* v. *Murphy*, 165 F. 304, 308 (8th Cir. 1908). And the Supreme Court of the District of Columbia reached the same conclusion in 1894 after conducting an exhaustive analysis of this Court's decisions. *See Chadick* v. *Duncan*, No. 15,317, at 78, 80-82 (D.C. Mar. 2, 1894). As one of the attorneys noted at oral argument in *Chadick*, several district courts had previously dismissed cases on the basis of tribal sovereign immunity, and no court had ever reached the contrary conclusion. *Id.* at 70-71.

Even if *Turner* represented "at best, an assumption of sovereign immunity for the sake of argument," *Kiowa*, 523 U.S. at 757, that assumption was well-founded by *Turner*'s time. To be sure, no decision of this Court squarely recognized the doctrine of tribal immunity until 1940. But no decision rejected it either—a fact that likely reflects the widely held assumption of immunity. In fact, Bay Mills is not aware of a single pre-1940 decision in any court (and Michigan cites to nothing) permitting a lawsuit to go forward against an unconsenting Indian tribe in the absence of specific congressional authorization. This judicial silence is telling, for there was no shortage of conflict between Indian tribes and non-Indians during the nineteenth

century. If compulsory judicial process had been available, *somebody* surely would have attempted to use it against a tribe at *some point* over the course of more than a hundred years.

Congress evidently shared the view that tribes could not be sued without authorization or consent. A statute from 1796, for example, set up a circuitous procedure for resolving certain property damage claims by non-Indians against Indian tribes: The claimant would apply to the United States for compensation; the United States would then ask the tribe for satisfaction; and if the tribe did not pay, the President would determine what "further steps" should be taken. Act of May 17, 1796, § 14, 1 Stat. 469, 472. This unwieldy sovereign-to-sovereign dispute resolution procedure, which was reenacted repeatedly during the nineteenth century, strongly suggests that claimants could not sue tribes directly.

It thus appears to have been universally assumed for many years that tribes were not amenable to suit. That assumption accords with the United States' traditional treatment of tribes as wholly foreign to the U.S. legal system. For at least the first century after the founding, Indian affairs " 'were more an aspect of military and foreign policy than a subject of domestic or municipal law.' " *United States* v. *Lara*, 541 U.S. 193, 201 (2004) (citation omitted). The founders put Indian tribes on par with states and foreign nations in the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. And for most of the eighteenth and nineteenth centuries, the federal government dealt with tribes largely through treaties and took pains to isolate them from American society. *See* Cohen § 1.03. The founders

and their successors would have been bewildered by the notion that tribal sovereigns could be haled into court at the pleasure of any frontiersman. As John Marshall put it during the Virginia ratifying convention, " 'It is not rational to suppose that the sovereign power should be dragged before a court.' " *Alden* v. *Maine*, 527 U.S. 706, 718 (1999) (citation omitted).

In any event, tribal sovereign immunity is now firmly established in our jurisprudence. Congress, courts, and the executive branch have acknowledged and reaffirmed the doctrine on numerous occasions. There is no warrant for altering it now.

V. A WIDE VARIETY OF ENFORCEMENT OPTIONS REMAIN AVAILABLE TO STATES.

Michigan and its amici pepper their legal arguments with the doomsday scenario that without federal-court suits to enjoin "unlawful gaming," law enforcement will be hamstrung, lawlessness will abound, and safety and sovereignty will be impaired. Because immunity undoubtedly can prevent a plaintiff from "pursuing the most efficient remedy" in a given case, *Oklahoma Tax Comm'n*, 498 U.S. at 514, Michigan's complaint is in large part a complaint about the very concept of immunity. After all, the design and effect of the immunity doctrines is to limit how and where a lawsuit may be brought. The states are of course comfortable with that concept when it comes to their own immunity—a fact highlighted by Michigan's invocation of sovereign immunity against Bay Mills' lawsuit seeking a declaratory judgment that the Vanderbilt parcel was "Indian lands." *See supra* at 17. This case merely

illustrates the "continuing vitality of the venerable maxim that turnabout is fair play." *Florida* v. *Seminole Tribe of Fla.*, 181 F.3d 1237, 1239 (11th Cir. 1999).

In any event, Michigan's doomsday rhetoric is empty. States are hardly powerless to prevent "unlawful gaming." In fact, they have a broad variety of enforcement options at their disposal, none of which necessitates a radical reformulation of the doctrine of tribal sovereign immunity.

The most obvious of those remedies is specified in the gaming compact itself: Michigan can invoke the arbitration mechanism in section seven of the compact. Pet. App. 89a-90a. Other gaming compacts include similar dispute resolution mechanisms. *See, e.g.*, Tribal Gaming Compact Between the Cherokee Nation and the State of Oklahoma, pt. 12 (Dec. 28, 2004). Indeed, Congress clearly anticipated that gaming disputes would be resolved through the procedures negotiated in gaming compacts. *See* 25 U.S.C. § 2710(d)(3)(C)(v) (gaming compacts may include provisions relating to "remedies for breach of contract"). For unknown reasons, Michigan opted not to invoke the detailed arbitration procedures set forth in the Bay Mills compact. That choice by Michigan provides no justification for twisting statutory text to create a new remedy more to its liking.

Michigan is certainly free to bargain for a judicial remedy during the next round of compact renewal negotiations (which are currently taking place). States have substantial leverage in compact negotiations because tribes need their consent to conduct class III gaming and because this Court's

decision in *Seminole Tribe* bars a tribe from suing to force states to negotiate. As part of those negotiations, Michigan might insist upon a waiver of tribal immunity. Indeed, Michigan could follow the lead of other states, which have induced such waivers by agreeing to waive their own immunity. That is precisely what Florida did after this Court's decision in *Seminole Tribe* and the Eleventh Circuit's subsequent decision that tribal immunity barred Florida's suit against the Seminole Tribe. *See* Gaming Compact Between the Seminole Tribe of Florida and the State of Florida, pt. XIII (Apr. 7, 2010). Many other gaming compacts—including compacts entered into by some of Michigan's amici—likewise include mutual waivers of sovereign immunity. *See, e.g.*, Tribal State Compact Among the Iowa Tribe of Kansas and Nebraska and the State of Kansas, § 31(E)-(I) (June 23, 1995); Compact Between the Sovereign Indian Nation of the Omaha Tribe of Nebraska and the Sovereign State of Iowa, § 21 (Jan. 19, 2007). Nothing prevents Michigan from following suit. Of course, here, Michigan did the *reverse*, insisting in the compact that neither it nor the tribe waived its immunity. Pet. App. 90a. If Michigan is unhappy with those terms, it can attempt to renegotiate them instead of asking this Court to circumvent them.

But even under the terms of the existing compact, Michigan retains several potential judicial remedies. For instance, it may be able to file an *Ex parte Young*-type suit against tribal officials to enjoin them from violating the law. *See Santa Clara Pueblo*, 436 U.S. at 59. In the context of state sovereign immunity, the *Ex parte Young* doctrine provides a remedy for ongoing unlawful conduct by a

governmental official where immunity would otherwise prevent enforcement of the law. *See Virginia Office for Protection & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1638 (2011). Parallel suits against tribal officers have the advantage of enabling states like Michigan to halt unlawful conduct while still respecting tribal sovereignty. Indeed, Michigan has already named a number of Bay Mills officials as defendants in its still-pending amended complaint. Pet. App. 56a-57a. Alternatively, Michigan could seek to enforce its gambling laws against the individuals running the Vanderbilt facility, rather than against the tribe itself. *See, e.g.*, Mich. Comp. Laws § 432.220 (any person who "conducts a gambling operation without first obtaining a license to do so" is subject to a civil penalty); Mich. Comp. Laws § 432.218(3)(d) (any person who conducts gambling activities without a license is guilty of a misdemeanor).

Michigan could also call upon the federal government to intervene in the dispute. The National Indian Gaming Commission may be able to order the Vanderbilt facility's closure. *See* 25 U.S.C. § 2713(b); 25 C.F.R. § 573.4.[7] Alternatively, the U.S. Attorney General can bring various civil and criminal enforcement actions against the tribe or individuals if it believes the tribe's actions violate federal law. *See, e.g.*, 18 U.S.C. § 1955 (prohibition of

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[7] To date, the National Indian Gaming Commission has taken a narrow view of its jurisdiction. *See* J.A. 102-07. But nothing prevents it from revisiting its position, and nothing prevents Michigan and other states from challenging that position through both political and legal channels.

illegal gambling businesses); 15 U.S.C. § 1172 (interstate transportation of gambling devices). Or the Department of the Interior may be able to take a final agency action regarding the Vanderbilt property, *see, e.g.*, 5 U.S.C. § 554(e) (declaratory order), which could then be challenged in court under the Administrative Procedure Act.

Finally, Michigan retains other potent remedies. If it decides that gambling is more trouble than it is worth, it can follow the lead of Utah and Hawaii and ban gambling throughout the state. That decision would prevent everybody in Michigan—Indians and non-Indians alike—from engaging in all but the most innocuous forms of gaming. *See* 25 U.S.C. § 2710(b)(1)(A), (d)(1)(B). Michigan and its fellow states could also attempt to secure legislation to limit or abrogate tribal immunity, and do through the legislative branch what it is improperly seeking to do here through the courts.

Of course, the Court need not, and should not, give an opinion on the propriety of any of these options. *See Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ordinarily, 'we do not decide in the first instance issues not decided below.' " (citation omitted)). The point is simply that suits under section 2710(d)(7)(A)(ii) are not Michigan's only means of accomplishing its goals. There is accordingly no justification for the Court to create an entirely new remedy that Congress never envisioned.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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ADDENDUM

The United States Code, 18 U.S.C. § 1166, provides:

§ 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include--

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

The United States Code, 25 U.S.C. §§ 2701 *et seq.*, provides, in pertinent part:

§ 2701. Findings

The Congress finds that--

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

§ 2702. Declaration of policy

The purpose of this chapter is--

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

* * *

§ 2703. Definitions

* * *

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7) (A) The term "class II gaming" means--

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include--

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

* * *

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

REPLY BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Introduction 1

Argument 3

I. Bay Mills concedes that the federal courts have subject-matter jurisdiction over this action. 3

II. Tribal immunity should not extend to illegal activity on a state's sovereign lands. 4

A. The most effective remedy in this case is to clarify or reform the common-law doctrine of tribal immunity. 4

1. This Court has authority to adapt the common law of tribal immunity. 4

2. Until Congress codifies tribal immunity, courts should develop it. 6

3. It is time to revisit *Kiowa*. 8

4. Just like other sovereigns, tribes should have no immunity for illegal commercial activity outside their sovereign territory. 10

5. The Tribes have no reliance interest in conducting illegal off-reservation activity free from federal-court scrutiny. 11

B. Alternatively, the Court should hold that tribes have no immunity under IGRA for illegal, off-reservation gaming. 13

III. Under IGRA, licensing and operating a casino is "class III gaming activity." 16

IV. There is no adequate forum outside the federal courts for states to stop illegal, off-reservation tribal gaming. 18

A. Arbitration is not a viable option. 18

B. An *Ex parte Young*-type suit is an inadequate remedy. 19

C. If Bay Mills prevails, Michigan cannot enforce a counterclaim in the suit against Michigan's Governor. 22

D. States cannot rely on the executive branch to shutter illegal, off-reservation casinos. 22

E. Prosecuting tribal officials and employees is a last—and highly questionable—resort. 24

Conclusion 25

TABLE OF AUTHORITIES

Page

Cases

Alfred Dunhill of London, Inc. v. *Republic of Cuba*,
425 U.S. 682 (1976) 6, 7, 10

Allen v. *Mayhew*,
2009 WL 426091 (E.D. Cal. Feb. 20, 2009) 8

Bay Mills Indian Community v. *Rick Snyder*,
Case No. 1:11-cv-729 (W.D. Mich.) 22

California v. *Cabazon Band of Mission Indians*,
480 U.S. 202 (1987) 7, 13

Chayoon v. *Chado*,
355 F.3d 141 (2d Cir. 2004) 8

Chickasaw Nation v. *United States*,
534 U.S. 84 (2001) 15

CIGNA Corp. v. *Amara*,
131 S. Ct. 1866 (2011) 12

Cook v. *AVI Casino Enterprises*,
548 F.3d 718 (9th Cir. 2008) 8

Crosby Lodge, Inc. v. *Nat'l Indian Gaming Ass'n*,
2007 WL 2318581 (D. Nev. Aug. 10, 2007) 20

Davids v. *Coyhis*,
869 F. Supp. 1401 (E.D. Wis. 1994) 20

Exxon Shipping Co. v. *Baker*,
554 U.S. 471 (2008) 6

Florida Paraplegic Assoc. v. *Miccosukee Tribe of Indians*,
166 F.3d 1126 (11th Cir. 1999) 8

Free Enterprise Fund v. *Public Company Accounting Oversight Board*,
130 S. Ct. 3138 (2010) 3

Hilton v. *South Carolina Public Railways Commission*,
502 U.S. 197 (1991) 12

Kiowa Tribe v. *Manufacturing Technologies*,
523 U.S. 751 (1998) ..... passim

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. *Patchak*,
132 S. Ct. 2199 (2012) 15

Murgia v. *Reed*,
338 F. App'x 614 (9th Cir. 2009) 24

Native Am. Distrib. v. *Seneca-Cayuga Tobacco Co.*,
546 F.3d 1288 (10th Cir. 2008) 8

Nevada v. *Hall*,
440 U.S. 410 (1979) 11

Oklahoma Tax Comm'n v. *Citizen Band, Potawatomi Tribe of Okla.*,
498 U.S. 505 (1991) 22

Puyallup Tribe v. *Department of Game*,
433 U.S. 165 (1977) 14

Samantar v. *Yousuf*,
560 U.S. 305 (2010) 6

Santa Clara Pueblo v. *Martinez*,
436 U.S. 49 (1978) 16

Seminole Tribe v. *Florida*,
517 U.S. 44 (1996) 13, 19

Stop the Beach Renourishment, Inc. v. *Florida Dep't of Envtl. Protection*,
130 S. Ct. 2592 (2010) 17

Tamiami Partners, Ltd. Ex rel. Tamiami Development Corp. v. *Miccosukee Tribe of Florida*,
177 F.3d 1212 (11th Cir. 1999) 20, 24

Trudgeon v. *Fantasy Springs Casino*,
71 Cal. App. 4th 632 (Cal. Ct. App. 1999) 8

United States v. *King*,
395 U.S. 1 (1969) 16

United States v. *Santee Sioux Tribe*,
135 F.3d 558 (8th Cir. 1998) 14

United States v. *Testan*,
424 U.S. 392 (1976) 16

Statutes

15 U.S.C. § 378(c)(1)(B) 4

18 U.S.C. § 1166(a) 14

18 U.S.C. § 1166(d) 14

25 U.S.C. § 2703(8) 16

25 U.S.C. § 2710 ..... 3, 16

25 U.S.C. § 2710(a)(1) 15

25 U.S.C. § 2710(b)(1) 15

25 U.S.C. § 2710(d)(1) 15

25 U.S.C. § 2710(d)(3)(A) 19

25 U.S.C. § 2710(d)(3)(B) 17

25 U.S.C. § 2710(d)(3)(C) 17

25 U.S.C. § 2710(d)(7) 19

25 U.S.C. § 2710(d)(7)(A)(ii) 13, 16

28 U.S.C. § 1331 3

American Indian Equal Justice Act,
S. 1691, 105th Cong., 2d Sess. (1998) 5

Foreign Sovereign Immunities Act,
Pub. L. No. 94-583 6

Indian Tribal Conflict Resolution and Tort
Claims and Risk Management Act of 1998,
S. 2097, 105th Cong., 2d Sess. (1998) 5

Prevent All Cigarette Trafficking Act of 2009,
Pub. L. No. 111-154 4

Rules

Sup. Ct. R. 15.2 17

INTRODUCTION

The Bay Mills Tribe now agrees that the federal courts have subject-matter jurisdiction to enjoin illegal, off-reservation tribal gaming, thus mooting the first issue presented. The only remaining question is whether the Tribe has sovereign immunity from such a suit. In their briefs, Bay Mills and its *amici* fail to address the fundamental enigma this question presents—why would Congress authorize a state to obtain a federal injunction against illegal tribal gaming on Indian lands, but not on lands subject to the state's own sovereign jurisdiction?

The answer is simple: Congress did *not* intend such an anomaly. When Congress enacted IGRA in 1988—a decade before this Court decided *Kiowa Tribe* v. *Manufacturing Technologies*, 523 U.S. 751, 756 (1998)—Congress either (1) believed that tribes had *no* immunity for illegal, off-reservation, commercial conduct, or (2) intended to abrogate any such immunity through IGRA's comprehensive scheme. Either way, this lawsuit should proceed.

In trying to shield its illegal casino from federal-court review, Bay Mills makes multiple errors, but three stand out. First, Bay Mills is wrong to assert that this Court lacks authority to alter the scope of tribal immunity. Bay Mills Br. 2, 18–19, 32, 47. Tribal immunity is a common-law doctrine that this Court created. At no time has Congress felt a need to codify the doctrine or its reach, or to place limits on the Court's authority to do so. Congress's inaction firmly commits the doctrine's further development to the common law.

Second, there is an urgent need for this Court to revisit the holding in *Kiowa*. Contra Bay Mills Br. 34–38. Lower courts—including the Sixth Circuit here—have applied *Kiowa* to insulate tribes from all manner of lawsuits, encouraging more aggressive commercial conduct seeking to exploit the immunity doctrine, including the expansion of illegal gaming. As confirmed by the continuing negative effects on states, businesses, and individuals, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity. *Kiowa*, 523 U.S. at 758.

Third, Michigan has no adequate alternative remedies. Contra Bay Mills Br. 53–57. Some of Bay Mills' suggestions—arbitration, an *Ex parte Young*-type suit, or a counterclaim in the Tribe's suit against Michigan's Governor—likewise face a tribal-immunity defense. Others require the State to rely on federal enforcement by the same agencies that have already declined requests by Michigan and the greater Indian community to stop Bay Mills' illegal conduct. And while perhaps the Michigan State Police could arrest tribal officials at the Vanderbilt casino site—something Michigan has done everything it can to avoid, given the potential inter-sovereign conflict—sovereign immunity may ultimately bar that action, too.

For the IGRA structure to work, tribes cannot be allowed to engage in illegal, off-reservation gaming, i.e., on lands subject to a state's exclusive jurisdiction. The federal courts should enjoin such illegal conduct, just as they would if a foreign nation or another state tried to open an illegal casino in Michigan. The Sixth Circuit should be reversed.

ARGUMENT

I. Bay Mills concedes that the federal courts have subject-matter jurisdiction over this action.

Bay Mills now accepts that the federal district court below had subject-matter jurisdiction to decide this suit and issue an injunction. Bay Mills Br. 23–24. The United States agrees. U.S. Br. 16 (acknowledging § 2710 does not displace § 1331 jurisdiction).

Amicus National Congress of American Indians continues to assert that there is no federal subject-matter jurisdiction here. NCAI Br. 4–13. But that assertion is not well founded. This Court has made clear that in the absence of statutory text "expressly limiting the jurisdiction that other statutes confer on district courts," plaintiffs remain free to invoke other jurisdictional statutes, such as § 1331. Michigan Br. 23 (discussing *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010).) No such express limitation appears in § 2710, so that is the end of the analysis.

The Tribe's concession narrows the dispute to a single question—whether sovereign immunity shields a tribe from federal-court review of illegal, commercial activity that takes place not on tribal lands, but on lands subject to a state's jurisdiction. Michigan respectfully requests that the Court answer that question "no" and reinstate the district court's injunction.

II. Tribal immunity should not extend to illegal activity on a state's sovereign lands.

A. The most effective remedy in this case is to clarify or reform the common-law doctrine of tribal immunity.

1. This Court has authority to adapt the common law of tribal immunity.

The Tribe says only Congress can modify tribal immunity, Bay Mills Br. 2, 18–19, 32, 44, 47, despite the doctrine's undisputed common-law origin. *Kiowa*, 523 U.S. at 756–58. But until Congress enacts a statute that codifies tribal immunity, it will continue to be a common-law doctrine that the courts can modify. And one thing is undeniable: Congress has never codified tribal immunity.

This does not mean that Congress hasn't weighed in; Congress has at times taken action regarding tribal immunity. But that action is almost always *abrogating* immunity in specific situations, or requiring a tribe to waive it. See U.S. Br. 30 (citing statutes). A reasonable conclusion to draw is that Congress is not a big fan of tribal immunity.

Michigan's opponents point to another breed of statute that neither creates nor abrogates tribal immunity but declares Congress's intent not to have any effect on it. E.g., the Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, § 2(E). These sorts of statutes declare that they shall not "be deemed to abrogate or constitute a waiver of any sovereign immunity" or "otherwise to restrict, expand, or modify any sovereign immunity." 15 U.S.C. § 378(c)(1)(B).

Michigan's opponents characterize this language as stripping this Court of its authority to modify common-law immunity. But a fairer reading is that Congress was disclaiming any intent to change common-law immunity. This is no more a ratification of tribal immunity than if Congress had been completely silent.

In their fruitless search to find evidence that Congress has embraced tribal immunity, Bay Mills and its *amici* also point to bills that Congress never even enacted. For example, Senator Gorton offered a bill in 1998 that would have significantly scaled back the common law of tribal immunity. American Indian Equal Justice Act, S. 1691, 105th Cong., 2d Sess. (1998). Congress never acted, and from this fact the Tribe asks the Court to conclude that Congress is opposed to any changes to common-law tribal immunity. Bay Mills Br. 41.

Of course, there are many reasons why any particular bill does not get enacted, and there are hundreds of such bills in each Congress. These include a counterpoint bill which would have found that tribes' sovereignty "predates the formation of the United States," which is another way to assert that this sovereignty is inherent. Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998, S. 2097, 105th Cong., 2d Sess. (1998). This bill was never enacted either. Based on Bay Mills' theory—that the rejection by Congress of statutory language means that its disapproval becomes the law—courts should not base any decisions on the notion that tribes enjoy inherent sovereignty.

In sum, congressional inaction doesn't mean Congress likes where the common law is; it means Congress is content with the Court drawing the common-law line. And when there is an anomaly in the common law, "in the absence of legislation, . . . it is hard to see how the judiciary can wash its hands of a problem it created." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 507 (2008) (modifying federal maritime common law). There can be no real dispute that this Court has the authority to define the scope of common-law tribal immunity.

2. Until Congress codifies tribal immunity, courts should develop it.

What the Tribe and its *amici* fail to explain is why, if Congress was so enamored with tribal immunity, it didn't take the logical step of passing a law that defines and preserves that immunity. Congress frequently codifies aspects of the common law, including immunity. For example, foreign sovereigns enjoyed a nearly blanket immunity from lawsuits in the United States for many years. But as early as the 19th Century, courts began chipping away at that blanket immunity. In *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976), this Court employed the restrictive theory of foreign sovereign immunity that allowed immunity only for foreign sovereigns' non-commercial activities. Congress liked that development and essentially codified the restrictive theory in the Foreign Sovereign Immunities Act. *Samantar* v. *Yousuf*, 560 U.S. 305, 313 (2010) ("Section 1602 describes the Act's two primary purposes: (1) *to endorse and codify* the restrictive theory of sovereign immunity. . .") (emphasis added).

Bay Mills has offered an explanation of FSIA's adoption that includes the surprising assertion that "the State Department overturned the 'virtually absolute' judicial conception of foreign sovereign immunity and created a new commercial activity exception in 1952." Bay Mills Br. 43. The Tribe appears to be saying that only the political branches are authorized to modify sovereign immunity, and that the courts just follow along. Not so. Long before 1952, courts employed the restrictive theory of foreign sovereign immunity. See *Alfred Dunhill*, 425 U.S. at 695–706 (1976) (describing history and noting cases drawing commercial-activity distinction as early as 1824).

In truth, the development of foreign-sovereign-immunity law followed a traditional path. And while courts may have considered the State Department's views, it was undeniably the *courts* that created and adapted common-law foreign immunity until Congress codified it in 1976. In other words, until Congress acts, courts should. And if Congress doesn't favor the course the Court takes, it can always choose a different path, just like Congress did when enacting IGRA in response to *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

Michigan's reading of Congress's preference is confirmed by Congress's continued refusal to codify tribal immunity, even after it was publicly invited to do so by the Court in *Kiowa*. Congress has once again refused to pass any such law, leaving this Court to address the problems it identified in *Kiowa* if it believes that is an appropriate course. Michigan respectfully suggests that it is.

3. It is time to revisit *Kiowa*.

Whether by limiting *Kiowa* to its facts, Michigan Br. 36–38, or revisiting *Kiowa*'s holding, Michigan Br. 38–41, the Court should reasonably limit tribal immunity. Lower courts have applied *Kiowa* to shield all manner of for-profit tribal businesses that perform no government function other than revenue production. E.g., *Native Am. Distrib.* v. *Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008) (immunity for tribal tobacco business); *Florida Paraplegic Assoc.* v. *Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999) (tribal restaurant and entertainment facility immune from Americans with Disabilities Act); *Trudgeon* v. *Fantasy Springs Casino*, 71 Cal. App. 4th 632 (Cal. Ct. App. 1999) (tribal casino immune from patron's suit for injury).

Courts have also extended tribal immunity to employees. E.g., *Chayoon* v. *Chado*, 355 F.3d 141 (2d Cir. 2004) (tribal-casino employee immune from FMLA claim); *Cook* v. *AVI Casino Enterprises*, 548 F.3d 718 (9th Cir. 2008) (tribal-casino employee immune from claim by man catastrophically injured as a result of employee serving alcohol at a casino party); *Allen* v. *Mayhew*, 2009 WL 426091 (E.D. Cal. Feb. 20, 2009) (tribal-casino managers immune from employment-discrimination claims).

Oklahoma's *amicus* brief (pp. 13–14 n.4 (citing 18 Oklahoma cases)) and Alabama's 16-state *amici* brief (pp. 11–16 (citing numerous additional cases)) further amplify the concerns this Court voiced in *Kiowa*.

This case is a perfect example. Not only will Michigan be forced out of court if the Tribe has its way, tribal immunity has already deprived a separate tribe—one that lawfully operates a competing casino on Indian lands near Vanderbilt—of a remedy for Bay Mills' illegal competition.

Given tribes' forays into these numerous commercial ventures, leveling the playing field makes sense. This reality has already been imposed on foreign governments that conduct business in the United States—first by the courts, then by Congress. Michigan Br. 33–35. The sky will not fall if blanket tribal immunity goes away; there are plenty of foreign companies that operate successfully in the United States though subject to suit. And tribes will still have the competitive advantage of paying limited taxes and avoiding state regulation for their businesses conducted *in* Indian country.

In fact, as established by the Tribe and its *amici*, a number of tribes have already waived immunity for their gaming operations to no ill-effect. Bay Mills Br. 8, 9, 55; NCAI Br. 20, n.8. And while it is understandable why tribes desire blanket immunity, the negative consequences for other parties, both tribal and non-tribal, are too high a price to pay.

All nine Justices in *Kiowa* noted "reasons to doubt the wisdom of perpetuating" tribal immunity. 523 U.S. at 758; *id.* at 764–66 (Stevens, J., dissenting). Michigan is not asking the Court to abolish the doctrine. But the Court should limit blanket immunity to reflect modern commercial realities and to bring tribal immunity in line with foreign-nation and state immunity.

4. Just like other sovereigns, tribes should have no immunity for illegal commercial activity outside their sovereign territory.

Alfred Dunhill explained why courts adopted the restrictive theory of foreign sovereign immunity: "The potential injury to private businessmen—and ultimately to international trade itself—from a system in which some of the participants in the international market are not subject to the rule of law has . . . increased." 425 U.S. at 703. "[S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty . . . ." *Id.* at 703–04.

So too here. There is little reason to insulate tribes from litigation as a means to promote economic self-sufficiency, given the "modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." *Kiowa*, 523 U.S. at 757. Tribal gaming in particular has grown exponentially, approaching private-gaming-sector size. Michigan Br. 9–10. Just as with blanket foreign immunity, there are dangers in a system that allows some participants in commerce to avoid the law.

And the cost to leveling the playing field is not high. Like foreign sovereigns, when tribes act in their commercial capacities they "do not exercise powers peculiar to sovereigns." *Alfred Dunhill*, 425 U.S. at 704. Treating tribal commercial activity like that of foreign nations is "unlikely to touch very sharply" on legitimate sovereign interests. *Id.*

In addition, there is no reason why tribes with common-law immunity should receive more protection from suit than constitutionally-immune states. This Court has authorized suits against a state arising out of conduct taking place in another state and filed in the courts where the conduct occurred. E.g., *Nevada* v. *Hall*, 440 U.S. 410 (1979). Particularly when the effect is to diminish a state's regulatory jurisdiction over its own lands, a state should not be denied an adequate remedy for illegal, off-reservation, commercial conduct.

5. The Tribes have no reliance interest in conducting illegal off-reservation activity free from federal-court scrutiny.

The Tribe urges the Court to deny Michigan's request to revise the common law of tribal immunity because "[w]hen the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision," the Court should hesitate to revisit that decision. Bay Mills Br. 42. While there may be circumstances where this logic would have force, this case is not one of them.

As explained above, Congress has not relied on the doctrine of tribal immunity in any statute it has passed. And when Congress has acknowledged that immunity, it has typically done away with it—hardly the stuff of reliance. Likewise, in statutes where Congress has stated its intent not to change immunity by abrogating it or expanding it, it has never incorporated the substance of such immunity into the statutory fabric.

In addition, there is no reliance interest here comparable to the one the Court identified in *Hilton* v. *South Carolina Public Railways Commission*, 502 U.S. 197 (1991). Bay Mills Br. 42. There, the Court affirmed its 30-year-old precedent that allowed railroad workers to sue states for money damages under the Federal Employees Liability Act. The Court explained that many states had excluded railroad workers from their workers compensation systems in reliance on the precedent. *Id.* at 202. The Court was also concerned about questioning whether the entire federal scheme of railroad regulation applied to state-owned railroads. *Id.* at 203. Overruling its earlier precedent would have also put at risk countless railroad employees who had acted in the belief that they were protected for injuries occurring on the job. *Id.*

In contrast here, tribes are trying to protect an unfair advantage in their business dealings. Tribes want to shield themselves from lawsuits, even if the plaintiff has a valid claim. While this may provide some economic benefit to tribes, it harms those with legitimate claims, and it harms tribes by discouraging non-tribal members from doing business with tribes.

Moreover, granting blanket immunity from suit does not create a healthy "reliance." An entity that can't be sued will be encouraged to take unwarranted risks because there is no fear of judicial review. And reliance is an equitable doctrine. *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1881 (2011). Allowing a party to engage in illegal conduct is never equitable.

Finally, if sovereign immunity creates such a powerful reliance interest, it would have discouraged the courts from adopting the restrictive theory of foreign sovereign immunity. That did not happen, nor should it here.

B. Alternatively, the Court should hold that tribes have no immunity under IGRA for illegal, off-reservation gaming.

IGRA was enacted to address this Court's decision in *Cabazon*, which held that states could not regulate gaming activities in Indian country. Viewing IGRA's text and structure as a whole, as this Court did in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), it is apparent that Congress intended states and tribes would be able to obtain a federal-court remedy for illegal gaming taking place either on or off Indian lands. The phrase "on Indian lands" in § 2710(d)(7)(A)(ii) was not a *limitation* on tribal-immunity abrogation but in fact an *expansion* of state authority into Indian country. Michigan Br. 25.

There was no federal law in 1988 that prohibited states from enjoining illegal gaming on lands subject to a state's exclusive jurisdiction. If there had been such a prohibition, Congress never would have provided an off-reservation "loophole" by limiting IGRA to "Indian lands." Congress reasonably believed that states already had authority to adequately remedy illegal acts on lands subject to exclusive state jurisdiction, whether those acts were performed by state citizens, foreign governments, or tribes.

Bay Mills' only contrary authority is *Puyallup Tribe* v. *Department of Game*, 433 U.S. 165 (1977), but in *Puyallup*, the Court's holding was limited to on-reservation conduct. *Id.* at 167–68 ("The Tribe . . . contends in this Court that the doctrine of sovereign immunity requires that the judgment be vacated, and that the state courts of Washington are without jurisdiction to regulate fishing activities *on its reservation*. . . . We hold that insofar as the claim of sovereign immunity is advanced on behalf of the Tribe, . . . it is well founded.") (emphasis added). Indeed, Justice Stevens authored *Puyallup*, yet wrote in his *Kiowa* dissent that the Court had never before expressly "applied the [tribal immunity] doctrine to purely off-reservation conduct." *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting).

In addition, IGRA provides that state anti-gaming laws and punishments apply equally in Indian country as elsewhere in a state, 18 U.S.C. § 1166(a), and that the United States has exclusive jurisdiction *only* over "criminal prosecutions" for violations of those laws. 18 U.S.C. § 1166(d). States therefore have concurrent on-reservation jurisdiction and exclusive off-reservation jurisdiction to pursue civil remedies involving illegal gaming. Michigan Br. 25–26. Congress intended to provide states (and other tribes) a remedy for illegal tribal gaming *wherever* it occurred. See *United States* v. *Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998) ("According to the government, 'all State laws' necessarily includes Nebraska civil case law authorizing injunctive relief to effectuate the closure of gambling establishments determined under State law to be public nuisances. We agree.").

These truths are confirmed by the fact that Congress authorized tribal gaming only on "Indian lands." 25 U.S.C. § 2710(a)(1) (Class I), (b)(1) (Class II), and (d)(1) (Class III); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2203, n.1 (2012). By restricting Indian gaming to Indian lands, IGRA reflected Congress's understanding in 1988 that in the absence of any off-reservation immunity for tribes, states could enjoin illegal gaming taking place on lands subject to state sovereign jurisdiction.

In that sense, IGRA was not a true "abrogation" at all; it did not change common-law tribal immunity but rather maintained the status quo. Cf. Bay Mills Br. 31 ("The statute simply has nothing to do with activity that takes place outside Indian lands."). Accordingly, it is subject to standard statutory rules of construction rather than the heightened standard typically used for abrogation.

But even under a heightened "unequivocal expression" test for abrogation, Michigan's construction of IGRA is the only reasonable one. Michigan Br. 25–30. Bay Mills and its *amici* offer no explanation why Congress would give states the power to enjoin illegal gaming on tribal reservations while simultaneously withholding the same power for illegal gaming taking place on land subject exclusively to state jurisdiction. Construing IGRA the opposite way, out of deference to an unequivocal-expression canon of construction, would defeat congressional intent, which is forbidden. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001).

Finally, as Michigan explained in its initial brief, the Court should consider whether an "unequivocal expression" test is the correct barometer for measuring congressional intent to abrogate tribal immunity. Michigan Br. 30–33. Unlike states, tribal sovereignty has no constitutional dimension, warranting a lesser standard. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978), did not consider that distinction, and simply adopted the abrogation test articulated in *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *King*, 395 U.S. 1, 4 (1969). But those cases involved the entirely different question of whether the United States waived its immunity in the Court of Claims. There is no explanation or logic for why the same waiver/abrogation test should apply to tribes.

III. Under IGRA, licensing and operating a casino is "class III gaming activity."

Bay Mills argues that its *on*-reservation activities of licensing and operating the Vanderbilt casino do not qualify as "class III gaming activity" under IGRA § 2710. Bay Mills Br. 22. The Tribe is wrong.

As the Tribe acknowledges, "class III gaming" is a defined term. 25 U.S.C. § 2703(8). If Congress wanted to limit § 2710(d)(7)(A)(ii) injunctions to the actual conduct of games, it would not have made § 2710 applicable to "class III gaming *activity*," a much broader concept that naturally includes conduct necessary for gaming, i.e., licensing and operation.

The Tribe selectively focuses on IGRA provisions that may contemplate only games themselves. But that doesn't mean the phrase can't extend to other matters depending on the context. For example, § 2710(d)(3)(B) and (C) say that a state and tribe may enter into a compact "governing gaming activities," *including* "standards for the operation of such activity and maintenance of the gaming facility, including licensing." The phrase "gaming activities" thus includes more than just the games themselves.

The same is true where IGRA contemplates a compact that governs how the parties allocate criminal and civil jurisdiction, and how they remedy breaches of contract. 25 U.S.C. § 2710(d)(3)(C). If these provisions govern "gaming activities," as IGRA demands, then such activities must be broader than just the games themselves. So interpreting the phrase "gaming activities" to include activities directly related to gaming more accurately reflects IGRA's structure and logic.

Bay Mills is also wrong to assert that the Court cannot consider the legality of the Tribe's on-reservation conduct because that issue is "new" and "outside the scope of the questions." Bay Mills Br. 19. Michigan raised this very argument in its petition as an alternative form of relief, Pet. 12, 15, a remedy the Court could have granted through a summary reversal. Bay Mills did not protest, thus waiving any procedural objection. Sup. Ct. R. 15.2; *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2610 (2010).

IV. There is no adequate forum outside the federal courts for states to stop illegal, off-reservation tribal gaming.

Bay Mills identifies a "wide variety of enforcement options" that it says remain available to states who wish to stop illegal gaming on sovereign state lands. Bay Mills Br. 53–57. These options are problematic at best.

A. Arbitration is not a viable option.

The Tribe accuses Michigan of avoiding arbitration "for unknown reasons." Bay Mills. Br. 54. There were, however, very good reasons.

The arbitration provision is not mandatory. Compact § 7(A) says that either party "may" invoke arbitration, Pet. App. 89a, and § 7(B) says that nothing in § 7(A) limits any remedy otherwise available to a party, Pet. App. 90a.

More important, Michigan didn't exercise its voluntary arbitration remedy because it had no assurance that the Tribe would abide by the arbitrator's ruling. Section 7(B) makes clear that nothing in the compact—including the § 7 arbitration provision—waives either party's sovereign immunity. Pet. App. 90a. If Michigan attempted to enforce a favorable award by reducing it to a federal-court judgment the Tribe would have asserted its immunity. Indeed, the Tribe has already ignored the determination by the Department of the Interior and the National Indian Gaming Commission that the Vanderbilt property was not Indian lands—the same issue that would have been presented to the arbitrator.

The Tribe asserts that Michigan should have negotiated a waiver of the Tribe's immunity. Bay Mills Br. 54–55. But Michigan had no power to make the Tribe waive its immunity, and at the time of negotiation (1993), this Court had not yet decided *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996) (holding that tribes cannot sue states to force compact negotiation). Given the one-sided negotiating posture—IGRA required Michigan to negotiate in good-faith a gaming compact, 25 U.S.C. § 2710(d)(3)(A), and authorized Bay Mills to sue in federal court to compel performance of that duty, 25 U.S.C. § 2710(d)(7))—Bay Mills had little incentive to waive immunity.

Furthermore, obtaining a waiver was not a high priority. When Michigan was negotiating in 1993—five years before *Kiowa*—this Court had not suggested that a tribe might have immunity when engaged in illegal, off-reservation gaming.

B. An *Ex parte Young*-type suit is an inadequate remedy.

The Tribe next argues that Michigan "may be able to file an *Ex parte Young*-type suit against tribal officials" or the individual tribal members running the Vanderbilt casino. Bay Mills Br. 55–56. But there are limitations on this remedy, including an inability to seize tribal gaming machines. U.S. Br. at 21–22 n.5. A state should not have to rely on a less comprehensive remedy when the subject matter is illegal commercial conduct taking place on lands subject to that state's exclusive jurisdiction.

More problematic, federal courts have held that *Ex parte Young*-type claims alleging IGRA violations are often barred by sovereign immunity. E.g., *Tamiami Partners, Ltd. Ex rel. Tamiami Development Corp.* v. *Miccosukee Tribe of Florida*, 177 F.3d 1212, 1225–26 (11th Cir. 1999) (rejecting IGRA claims against a tribal official because it "is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require the sovereign's specific performance of a contract."); *Crosby Lodge, Inc.* v. *Nat'l Indian Gaming Ass'n*, 2007 WL 2318581, at *4 (D. Nev. Aug. 10, 2007) ("Crosby may not bring a private cause of action [asserting *Ex parte Young* relief] against Tribal Defendants for alleged non-compliance with IGRA"); *Davids* v. *Coyhis*, 869 F. Supp. 1401 (E.D. Wis. 1994) ("I will not . . . permit the intrusion on tribal sovereignty that adjudication of this [*Ex parte Young* IGRA] action would present.").

And even if Michigan is successful in bringing an *Ex parte Young* action, such litigation is preordained to create friction between a state and a tribe. An *Ex parte Young* suit brought by one sovereign against another sovereign's officials has very different political ramifications than a citizen bringing such a suit against her government. No one flinches when a Michigan citizen brings an *Ex parte Young* action against a Michigan official, but imagine the international uproar if Michigan tried to circumvent the United Kingdom's sovereign immunity by suing Prime Minister David Cameron. That type of inter-sovereign friction is precisely what Congress was trying to avoid when it enacted IGRA.

Bay Mills seems to forget it has filed its own motion to dismiss Michigan's *Ex Parte Young*-type claims against the tribal officials in the underlying action. In that motion, Bay Mills argues that Michigan's claims against its officials must be dismissed because:

- Bay Mills council members are covered by Bay Mills' sovereign immunity, as they are elected officials of Bay Mills. 10/23/12 Bay Mills Br. in Support of Mot. to Dismiss 16–17.

- Michigan's *Ex parte Young* claims do not overcome Bay Mills' special sovereignty interests in exercising governmental power over its land. *Id.* at 17–20.

- *Ex parte Young*-type claims do not apply to IGRA-violation claims. *Id.* at 20–22.

- Bay Mills is a required party that cannot be joined because it is immune from suit. *Id.* at 22–28.

- And any judgment rendered in the Tribe's absence would be prejudicial and inadequate. *Id.*

Such defenses in the court below belie Bay Mills' remedy suggestion to this Court.

C. If Bay Mills prevails, Michigan cannot enforce a counterclaim in the suit against Michigan's Governor.

The United States suggests that Michigan could simply litigate the separate federal-court action that the Tribe has filed against Michigan's Governor, *Bay Mills Indian Community* v. *Rick Snyder*, Case No. 1:11-cv-729 (W.D. Mich.). U.S. Br. 32–33. There, Bay Mills seeks declaratory relief against the Governor on many of the same issues raised in this litigation. But Bay Mills has not waived its immunity with regard to any counterclaim Michigan might bring in that action, such as a claim to enjoin Bay Mills from gaming outside Indian lands. See *Oklahoma Tax Comm'n* v. *Citizen Band, Potawatomi Tribe of Okla.*, 498 U.S. 505, 509–10 (1991) (tribe does not waive its sovereign immunity by filing action for injunctive relief). So *Snyder* is of no practical value to Michigan in stopping Bay Mills' illegal casino.

D. States cannot rely on the executive branch to shutter illegal, off-reservation casinos.

The United States also says Michigan could request approval from the NIGC of a site-specific gaming ordinance describing the Vanderbilt Parcel and seek judicial review of an adverse decision. U.S. Br. 33. That is a puzzling suggestion for several reasons:

- Neither Michigan nor any other party can compel the Tribe to request such an amendment to its gaming ordinance.

- The Tribe *did* twice submit such a request and withdrew it before the NIGC took action, presumably because the Tribe believed the agency decision would not be favorable. There is no reason to believe that the Tribe will pursue a different course now.

- And even if a federal court affirmed an NIGC determination rejecting the gaming ordinance amendment, this would not preclude the Tribe from operating a casino outside Indian lands because the order could not—under the United States' own argument—include an injunction prohibiting the Tribe from operating the illegal casino.

It is also no answer for Michigan to rely on the executive branch's criminal and civil enforcement authority. Bay Mills Br. 56–57. The NIGC has already referred this matter to the United States Attorney along with NIGC's express determination that the casino was not operating on Indian lands. Yet no action was taken to stop the illegal activity. Michigan cannot count on the executive branch to enforce federal law in this area; only a federal-court injunction against the Tribe is adequate to protect Michigan's sovereign authority over its lands and to ensure the Tribe's compliance with state and federal law.

E. Prosecuting tribal officials and employees is a last—and highly questionable—resort.

Finally, Bay Mills and the United States urge Michigan to send in the state police to arrest tribal officials and employees. Bay Mills Br. 56; U.S. Br. 33–34. So instead of pursuing the least intrusive remedy—a federal civil injunction—Michigan should treat Tribal officials like common criminals. That is a recipe for inter-sovereign conflict.

Bay Mills' implicit suggestion is that Michigan's criminal arrest of tribal officials is preferable to eviscerating tribal immunity. But when IGRA already abrogates immunity for illegal gaming *on* Indian lands, how does it eviscerate immunity merely to allow civil injunctive remedies for illegal, *off*-reservation conduct?

And while the United States says its position is that such tribal officials are not protected by tribal immunity, neither the Tribe, nor the *amici* have concurred. Michigan agrees with the United States that immunity should not protect such officials. But if forced to pursue such a remedy, there is little doubt those officials will assert they are acting merely as a tribe's agents, they were at all times acting within the scope of their agency or employment, and that the tribe's immunity protects them from prosecution. There is authority that supports this claim. *Tamiami Partners*, 177 F.3d at 1225–26; *Murgia* v. *Reed*, 338 F. App'x 614, 616 (9th Cir. 2009).

Michigan believes that prosecuting tribal officials should be a last resort and has strived to treat the Tribe and its officials with the respect a sovereign deserves. But disagreements cannot always be resolved through negotiation, and Congress intended that tribal-gaming disputes be resolved in federal court. It does not make sense to force Michigan to pursue throw-a-dart remedies of uncertain validity and scope that create inter-sovereign friction.

CONCLUSION

The court of appeals should be reversed.

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Dated: NOVEMBER 2013

SUPPLEMENTAL BRIEF

No. 12-515

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

SUPPLEMENTAL ARGUMENT 3

I. There is an undeniable split among the circuits regarding federal-court jurisdiction over tribal gaming disputes. 3

II. The Solicitor General concedes there is also a circuit split regarding the scope of IGRA's abrogation of tribal sovereign immunity. 6

III. This case is the best, and possibly the only, vehicle to resolve the parties' dispute. 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Bay Mills Indian Community v. *Rick Snyder*,
Case No. 1:11-cv-729 (W.D. Mich.) 9

Cabazon Band of Mission Indians v. *Wilson*,
124 F.3d 1050 (9th Cir. 1997) 1, 3, 4, 5

Ex parte Young,
209 U.S. 123 (1908) 2, 8

Florida v. *Seminole Tribe of Florida*,
181 F.3d 1237 (11th Cir. 1999) 7

Free Enterprise Fund v. *Public Company Accounting Oversight Board*,
130 S. Ct. 3138 (2010) 4

Ins. Corp. of Ireland, Ltd. v. *Compagnie des Bauxites de Guinee*,
456 U.S. 694 (1982) 4

Mescalero Apache Tribe v. *New Mexico*,
131 F.3d 1379 (10th Cir. 1997) 1, 3, 4, 6

New Mexico v. *Pueblo of Pojoaque*,
30 F. App'x 768 (10th Cir. 2002) 7

Statutes

25 U.S.C. § 2701 *et seq.* 2
25 U.S.C. § 2703(4) 6
25 U.S.C. § 2710 ..... 3, 4
25 U.S.C. § 2710(d)(7)(A)(ii) 5
28 U.S.C. § 1331 ..... 3, 4

Other Authorities

Const. and Bylaws of the Bay Mills Indian Community, Art. II, § 1 6

INTRODUCTION

The federal government agrees with Michigan that the Vanderbilt Parcel is not Indian trust land eligible for gaming. U.S. Br. 7. Thus, the United States necessarily agrees that the Vanderbilt casino is an illegal gaming operation, conducted on Michigan sovereign lands. Nonetheless, the United States sides with the Tribe in recommending that the petition be denied, foreclosing Michigan's ability to enjoin the casino. Each of the Solicitor General's supporting reasons is flawed.

First, the Solicitor General suggests that the petition presents no true circuit split. U.S. Br. 12–20. In fact, there are two splits. To begin, there is a direct conflict between the Sixth Circuit decision here, Pet. App. 9a, and the Ninth Circuit's decision in *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997), regarding federal-court jurisdiction over claims seeking to enforce Tribal-State compacts. The Solicitor General distinguishes *Cabazon* because the compact at issue there said that disputes could be resolved in federal court. U.S. Br. 15. But parties cannot confer federal jurisdiction by agreement. Thus, this circuit split remains. Pet. 7–12.

There is also a direct conflict between the Sixth Circuit decision here, Pet. App. 13a, and the Tenth Circuit's decision in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997), regarding tribal sovereign immunity. Like the Tribe, the Solicitor General argues that *Mescalero* was wrongly decided. U.S. Br. 18–19. But that merits argument does not in any way diminish the circuit split or the need to resolve it. Pet. Reply 7–8.

Second, the Solicitor General says that Michigan has other viable federal-court remedies: claims against individual tribal officers, and the lawsuit the Tribe filed against Michigan's Governor. U.S. Br. 21–22. The first suggestion ignores the inter-sovereign conflicts and jurisdictional pitfalls inherent in pursuing individual tribal officers through an *Ex Parte Young* action. Pet. Reply 3. And the second is inconsistent with the *amicus* brief's merits position: under the United States' view on tribal immunity, a federal court that declares the Vanderbilt casino invalid lacks the ability to enjoin the illegal gaming operation against a sovereign tribe. That cannot possibly be what Congress intended in the Indian Gaming Regulatory Act.

Finally, the Solicitor General intimates that this Court's review is unnecessary because the United States itself "has criminal and civil enforcement authority." U.S. Br. 19. But the reality is that—despite an express referral from the National Indian Gaming Commission (NIGC) to the United States Attorney for enforcement—*no enforcement action has ever been taken*. The history of this case shows that Michigan cannot rely on federal-government enforcement.

In sum, the United States *amicus* brief effectively establishes why this Court's immediate intervention is so crucial: granting the petition will allow resolution of two recurring and widening circuit splits regarding allocations of authority between states and tribes, while denial perpetuates uncertainty, results in different outcomes depending on the circuit where an illegal casino is located, and encourages the proliferation of off-reservation tribal casinos that violate federal law.

Certiorari is warranted.

SUPPLEMENTAL ARGUMENT

I. There is an undeniable split among the circuits regarding federal-court jurisdiction over tribal gaming disputes.

As Michigan demonstrated in its petition, there is an irreconcilable conflict between the Sixth Circuit decision below and previous decisions of the Ninth and Tenth Circuits regarding federal-court jurisdiction over tribal gaming disputes. Pet. 10–12. The Sixth Circuit held that federal courts have jurisdiction over such disputes only if the dispute involves "five prerequisites," including gaming activity conducted on Indian lands and in violation of a Tribal-State compact that is in effect. Pet. App. 7a. The Sixth Circuit declined to recognize that 28 U.S.C. § 1331's general grant of federal-question jurisdiction encompasses this tribal gaming dispute.

In contrast, the Ninth Circuit in *Cabazon* held that federal courts do have jurisdiction of such disputes, even where all five of the prerequisites were not present in that case. Pet. 10–11; *Cabazon*, 124 F.3d at 1056 (a "claim to enforce the Compacts arises under federal law and thus [ ] we have jurisdiction pursuant to 28 U.S.C. § 1331"). And the Tenth Circuit reached the same conclusion under § 2710 itself in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379, 1396 (10th Cir. 1997). Accord *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court").

As noted in the introduction, the United States tries to distinguish *Cabazon* because the parties there agreed in their compact to federal-court review, while Michigan and Bay Mills did not so agree here. But a federal court's subject-matter jurisdiction either exists or it does not; no agreement of the parties can confer such jurisdiction on the federal courts. *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). The conflict thus remains.

With respect to *Mescalero*, the United States attempts to distinguish the case because it involved a compact that had been entered into but was allegedly not authorized. U.S. Br. 17. Under the Sixth Circuit's "five prerequisites" test, that would mean no federal jurisdiction. Pet. App 7a. But the Tenth Circuit held that jurisdiction *did* exist under § 2710. 131 F.3d at 1382–83, 87. The only other point the United States makes is that *Mescalero* "did not contain a detailed jurisdictional analysis." U.S. Br. 17. But again, that does not diminish the circuit split.

As the petition also explains, *Cabazon* is consistent (and the Sixth Circuit's ruling here inconsistent) with *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010). Pet. 9. The United States asserts that *Free Enterprise Fund* is distinguishable because the facts of that case may have involved a so-called collateral attack on the statute in question. U.S. Br. 14. But that is not a distinguishing feature. *Free Enterprise Fund* held that in the absence of statutory text that "expressly limit[s] the jurisdiction that other statutes confer on district courts," plaintiffs remain free to invoke other jurisdictional statutes such as § 1331. 130 S. Ct. at 1350. The same is true here.

Perhaps recognizing that the circuits are, in fact, in conflict, the United States tries to reframe the issue entirely. The Solicitor General argues that what the Sixth Circuit *really* held was that Michigan failed to state a cause of action under § 2710(d)(7)(A)(ii). U.S. Br. 13. Of course, the Sixth Circuit never said that. And if it had, such a ruling would itself conflict with *Cabazon*, where the Ninth Circuit allowed a breach-of-compact claim to proceed even absent an allegation that the breach occurred on Indian lands. The bottom line is that the Ninth Circuit held that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Cabazon*, 124 F.3d at 1056, and the Sixth Circuit reached the opposite conclusion using the "five prerequisites" test. Whether framed in terms of jurisdiction or causes of action, there is a conflict requiring this Court's resolution.

Finally, as the petition explains, the Sixth Circuit should have recognized federal-court jurisdiction because illegal Class III gaming activities *did* occur on Indian lands: the Tribe's licensing of the off-reservation casino and the Tribe's ongoing supervision of the Vanderbilt operation. Pet. 12. The Solicitor General says this contention is "not properly before this Court" because the underlying facts were not alleged until the amended complaint, which post-dates this appeal. U.S. Br. 17 n.4. But Bay Mills has already admitted that the Tribe's Executive Council "made the decision to own and operate the Vanderbilt casino," Pet. App. 59a, ¶ 21; Pet. App. 43a, ¶ 21, and that this action was taken "with the approval of the Tribal [Gaming] Commission," Pet. App. 59a, ¶ 19; Pet. App. 43a, ¶ 19.

These admissions are dispositive. The Tribe, through its Executive Council, derives its governmental authority from its reservation. Const. and Bylaws of the Bay Mills Indian Community, Art. II, § 1 ("The jurisdiction of the Bay Mills Indian Community shall extend to all territory within the original confines of the Bay Mills Reservation . . . and to such other land . . . as may be added thereto . . . ."). And a tribe's reservation constitutes "Indian lands." 25 U.S.C. § 2703(4). As a result, the Tribe's authorizing, licensing, and operation of the Vanderbilt casino necessarily occurred *on Indian lands*, satisfying the jurisdictional requirements the Sixth Circuit outlined in its opinion. This reality provides an additional reason why Michigan is entitled to relief.

II. The Solicitor General concedes there is also a circuit split regarding the scope of IGRA's abrogation of tribal sovereign immunity.

With respect to the circuit split regarding IGRA and tribal sovereign immunity, Pet. 13–15, the Solicitor General's position is that *Mescalero* was incorrectly decided. U.S. Br. 18–19. If the Court grants the petition, the parties will have ample opportunity to explore which circuit got it right. But arguing the merits of the Tenth Circuit's decision does not change the reality that the Sixth and Tenth Circuits are indeed split on the issue of IGRA's abrogation of tribal sovereign immunity.

As even the United States concedes, the Tenth Circuit has a "broader view of the scope of IGRA's abrogation of tribal sovereign immunity." U.S. Br. 19. And while it is true that no other circuit has agreed

with the Tenth Circuit, U.S. Br. 19, the Tenth Circuit has continued to follow this precedent, e.g., *New Mexico* v. *Pueblo of Pojoaque*, 30 F. App'x 768, 769 (10th Cir. 2002), meaning that gaming suits brought against tribes will continue to reach different outcomes depending on the circuit where the tribe is located.

There is also an apparent conflict between the Sixth Circuit decision here and the Eleventh Circuit's decision in *Florida* v. *Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999). The Solicitor General cites *Seminole Tribe* for the proposition that IGRA "abrogates tribal sovereign immunity only in the 'narrow circumstance[s]' specified in the statute." U.S. Br. 18. But the full quote from *Seminole* is that "Congress [in IGRA] abrogated tribal immunity only in the narrow circumstance *in which a tribe conducts class III gaming in violation of an existing Tribal-State compact*." *Id.* at 1242 (emphasis added). Here, the complaint alleges that Bay Mills was conducting class III gaming in violation of its existing tribal-state compact. See also Pet. 13–15 (discussing decisions of the Seventh and Ninth Circuits which are also in conflict).

In sum, the circuit courts are in disagreement concerning the very serious question of abrogation of tribal sovereign immunity. Bringing clarity to this issue now will serve the interests of *both* states and tribes. And even if the Court ultimately adopts a narrow theory of abrogation, Michigan is entitled to relief due to the illegal activities, discussed above, in which the Tribe engaged on Indian lands. Pet. 12.

III. This case is the best, and possibly the only, vehicle to resolve the parties' dispute.

Like Bay Mills, the United States argues for denial of certiorari because Michigan was allowed to amend its complaint to seek prospective injunctive relief against various tribal officials by pursuing an *Ex parte Young*-type claim. *Ex parte Young*, 209 U.S. 123 (1908). For the reasons stated in the petition, *Ex parte Young* is a secondary, unreliable remedy at best. Right or wrong, courts have dismissed such actions when the relief requested essentially requires the sovereign's specific performance of a contract. And such individual litigation is preordained to create friction between a state and a tribe, just like the international friction present if Michigan sued a foreign leader to circumvent a country's sovereign immunity. Pet. 16–17.

As the Solicitor General notes, the tribal official defendants here have asserted immunity and numerous other defenses, some peculiar to an *Ex parte Young* case, in motions to dismiss that are pending before the district court. U.S. Br. 21. Allowing a state to sue a *tribe* in federal court, and not just its officials, alleviates unnecessary uncertainties and inter-sovereign conflict that this Court should not allow to persist.[1]

---

[1] The United States cites this Court's general rule that it prefers not to exercise certiorari jurisdiction until a final order is entered, but does not address Michigan's argument that because this case implicates significant jurisdictional issues it is appropriate for this Court to grant certiorari, even though this is an appeal of an interlocutory decision. Reply Brief 5 (citations omitted).

The Solicitor also suggests that the merits issue could be resolved in the Tribe's case against Michigan Governor Rick Snyder. *Bay Mills Indian Community* v. *Rick Snyder*, Case No. 1:11-cv-729 (W.D. Mich.). In that case, Bay Mills seeks declaratory relief against Governor Snyder on many of the same issues raised by Michigan here. But the best Michigan can hope for in that proceeding is a determination with no remedy. Under the United States' view, the same federal court that made such an Indian lands declaration lacks jurisdiction when Michigan seeks to file a counterclaim for injunction against the Tribe. And Bay Mills has already ignored an unambiguous determination by NIGC that the Vanderbilt casino was not on Indian lands. A declaration without teeth is no remedy at all.

More puzzling is the United States' argument that Michigan does not need access to federal court because the Tribe could submit a "site-specific gaming ordinance describing the Vanderbilt Parcel" for approval by the NIGC, which would be subject to administrative review. U.S. Br. 22. There are numerous problems with this argument:

- Neither Michigan nor any other party can compel the Tribe to request such an amendment to its gaming ordinance;

- In fact, the Tribe *did* previously submit such a request and withdrew it before the NIGC took action, presumably because the Tribe believed the agency decision would not be favorable. There is no reason to believe that the Tribe will pursue a different course now; and

- Even if a federal court affirmed an NIGC determination rejecting the gaming ordinance amendment, this would not preclude the Tribe from operating a casino outside Indian lands because, for the reasons discussed above, the order could not—under the United States' jurisdiction argument—include an injunction prohibiting the Tribe from operating the illegal casino.

Finally, the Solicitor General says Michigan does not need a federal-court order because the United States itself has "criminal and civil enforcement authority" in this area. U.S. Br. 22. But the NIGC has already referred this matter to the United States Attorney along with NIGC's express determination that the casino was not operating on Indian lands. And yet the federal government took no action to stop the illegal activity. Michigan cannot count on the United States to enforce federal law in this area; only a federal-court injunction against the Tribe is adequate to protect Michigan's sovereign authority over its lands and to ensure the Tribe's compliance with federal law.

* * *

The Solicitor General's brief is most notable for what it does *not* say: why Congress would conceivably have wanted to allow states to bring federal actions to enjoin Indian gaming in violation of a compact when the gaming takes place on Indian land, but not when it takes place on sovereign state land. That is not what Congress intended. Pet. 8–9. Worse, the government's *amicus* arguments will inevitably push states into an undesirable position: pursuing state criminal-law remedies against individual tribal officials. This Court's immediate review is warranted.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply in support of the petition, the petition for writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

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v.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction over a State's claim brought under 25 U.S.C. 2710(d)(7)(A)(ii) seeking to enjoin gaming by an Indian tribe, where the State alleges that the gaming is not located on "Indian lands" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. 2703(4).

2. Whether Congress abrogated an Indian tribe's sovereign immunity with respect to a State's claim that the tribe is gaming illegally outside of Indian lands.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 11
Argument:
I. The court of appeals correctly held that Counts I-III in petitioner's complaint must be dismissed 14
A. Petitioner's claims do not fall within Section 2710(d)(7)(a)(ii) 14
B. Even if there is jurisdiction over Counts I-III under 28 U.S.C. 1331, the claims were properly dismissed 16
II. Petitioner's claims against respondent are barred by tribal sovereign immunity 19
A. IGRA does not abrogate respondent's sovereign immunity with respect to petitioner's claims 20
B. There is no basis for this Court to create an exception to tribal sovereign immunity for off-reservation commercial activities 27
III. There are alternative ways to adjudicate the status of the Vanderbilt Parcel 31
Conclusion 35

TABLE OF AUTHORITIES

Cases:

Alaska v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998) 21
Blatchford v. *Native Vill. of Noatak*, 501 U.S. 775 (1991) 19
C & L Enters. v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) 20

Cases—Continued: Page

Cabazon Band of Mission Indians v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997), cert. denied, 524 U.S. 926 (1998) 17, 18
California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) 2
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 23
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Grable & Sons Metal Prods., Inc. v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) 10
Hagen v. *Utah*, 510 U.S. 399 (1994) 33
Idaho v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997) 19
Kiowa Tribe v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998) 19, 27, 28, 29
Lewis v. *Norton*, 424 F.3d 959 (9th Cir. 2005) 26
Mescalero Apache Tribe v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997) 9, 18, 19, 25
Michigan United Conservations Clubs v. *Anthony*, 280 N.W.2d 883 (Mich. Ct. App. 1979) 34
Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) 24
Morton v. *Mancari*, 417 U.S. 535 (1974) 28
National Farmers Union Ins. Cos. v. *Crow Tribe of Indians*, 471 U.S. 845 (1985) 23
Oklahoma Tax Comm'n v. *Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) 19, 24, 28, 29, 30
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Rowe v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) 33
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 19, 20, 23, 32
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 16
Taxpayers of Mich. Against Casinos v. *State*, 685 N.W.2d 221 (Mich. 2004), cert. denied, 543 U.S. 1146 (2005) 22
Three Affiliated Tribes v. *Wold Eng'g*, 476 U.S. 877 (1986) 19
United Keetoowah Band of Cherokee Indians v. *Oklahoma*, 927 F.2d 1170 (10th Cir. 1991) 22
United States v. *Lara*, 541 U.S. 193 (2004) 28
United States v. *United States Fid. & Guar. Co.*, 309 U.S. 506 (1940) 19, 28
United States v. *Wheeler*, 435 U.S. 313 (1978) 29
Verizon Md. Inc. v. *Public Serv. Comm'n*, 535 U.S. 635 (2002) 16
Wagnon v. *Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) 14
Washington v. *Confederated Tribes*, 447 U.S. 134 (1980) 29

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Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 24
Young, Ex parte, 209 U.S. 123 (1908) 13, 33

Constitution, statutes and regulations:

U.S. Const.:
Art. I:
§ 8, Cl. 3 24
§ 10, Cl. 1 24
Art. II, § 2, Cl. 2 24
Amend. XI 33
Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478:
§ 213(a)(2), 118 Stat. 3531 30
§ 301, 118 Stat. 3551 30
Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (25 U.S.C. 2701 *et seq.*):
§ 23, 102 Stat. 2487 20
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25 U.S.C. 2703(4) 2, 31
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25 U.S.C. 2710(b) 3

Statutes and regulations—Continued: Page

25 U.S.C. 2710(b)(2)(B) 29
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25 U.S.C. 2710(d)(3)(C) 14
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25 U.S.C. 2710(d)(3)(C)(i) 4
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25 U.S.C. 2710(d)(7)(A)(ii) ..... *passim*
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25 U.S.C. 2714 33
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25 U.S.C. 2719 ..... 6, 10, 16
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§ 104, 111 Stat. 2653 5
§ 107(a)(1), 111 Stat. 2658 5
§ 107(a)(3), 111 Stat. 2658 ..... 5, 6
No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1043, 115 Stat. 2076 30
Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, § 2(e), 124 Stat. 1101 30

Statutes and regulations—Continued: Page

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Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, § 8(a)(1), 117 Stat. 795 30
5 U.S.C. 701 *et seq.* 33
15 U.S.C. 1172 4
18 U.S.C. 1151 3
18 U.S.C. 1166 ..... 12, 20, 21, 22
18 U.S.C. 1166(a) 4, 20, 21
18 U.S.C. 1166(d) 4, 21
18 U.S.C. 1955 ..... 4, 14
28 U.S.C. 1331 ..... *passim*
28 U.S.C. 1362 ..... 7, 8
Mich. Comp. Laws Ann. (West):
§§ 432.218-432.220 (2001) 33
§ 432.220 (2001) 9
§ 600.3801 (Supp. 2013) 34
§ 750.303(1) (2004) 33
25 C.F.R.:
Section 502.4 3
Section 502.12 2
Section 522.7 33
Section 571.3 7
Section 573.3 3
Pt. 580 33
Section 580.10 33

Miscellaneous:

American Indian Equal Justice Act, S. 1691, 105th Cong., 2d Sess. (1998) 30

Miscellaneous—Continued: Page

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p. 29,355 16

p. 29,357 16

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The Federalist No. 81 (Alexander Hamilton) (Jacob Ernest Cooke ed. 1961) 24

In the Supreme Court of the United States

No. 12-515

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case involves the interpretation of a section of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701-2721, that provides for suits in federal court by a State to enjoin a class III gaming activity located on Indian lands and conducted in violation of a Tribal-State compact that is in effect. 25 U.S.C. 2701(d)(7)(A)(ii). The case also involves the question whether Congress has abrogated tribal sovereign immunity with respect to a State's claim that a tribe is gaming illegally outside of Indian lands. The Secretary of the Interior has under IGRA the authority to approve or disapprove Tribal-State gaming compacts. 25 U.S.C. 2710(d)(8). The National Indian Gaming Commission (NIGC) also has substantial responsibilities under IGRA, including the approval of tribal

gaming ordinances and enforcement authority. 25 U.S.C. 2710(d)(1) and 2713. More generally, the United States has a substantial interest in the continued recognition of tribal sovereign immunity from suit, which furthers Congress's policy of encouraging tribal self-determination and economic development. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. In 1987, this Court held that California could not enforce its gaming laws against Indian tribes operating bingo and poker games on their reservations, when such games were not prohibited by state law. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 221. That decision left much Indian gaming unregulated by the States, but federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In 1988, Congress enacted IGRA, 25 U.S.C. 2701-2721, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1).

IGRA regulates gaming only on "Indian lands," which are defined as: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual[,] or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4); 25 C.F.R. 502.12. Even on Indian lands as so defined, IGRA provides that gaming shall not be conducted "on lands acquired by the Secretary

[of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988," unless the land satisfies a listed exception. 25 U.S.C. 2719(a). When gaming occurs outside of Indian lands, it is outside of IGRA's regulatory framework and is instead governed by state law.

IGRA divides gaming into three classes, each subject to different regulation. 25 U.S.C. 2703(6)-(8). Class III gaming, at issue here, includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming must be: (1) authorized by a tribal ordinance that satisfies the requirements in 25 U.S.C. 2710(b) and is approved by the Chairman of the NIGC; (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian tribe and the State that is approved by the Department of the Interior (Interior). 25 U.S.C. 2710(d)(1).

b. The federal government may enforce federal gaming laws against Indian tribes. If a tribe engages in class III gaming on Indian lands in violation of IGRA or a tribal ordinance, the NIGC Chairman has the authority to assess civil penalties or issue a closure order. 25 C.F.R. 573.3; 25 U.S.C. 2713. In addition, IGRA makes state laws "pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto," applicable in "Indian country"[1] as federal law, and

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[1] "Indian country" includes all lands within the limits of any Indian reservation, all dependent Indian communities set aside by the federal government for the use of Indians as Indian lands, and all Indian allotments, whether held in trust or restricted fee. 18 U.S.C. 1151.

provides that the United States shall have exclusive jurisdiction over criminal prosecutions for violations of such laws "unless an Indian tribe pursuant to a Tribal-State compact * * * has consented to the transfer to the State of criminal jurisdiction." 18 U.S.C. 1166(a) and (d). Outside of Indian country, the United States may enforce against gambling conducted by Indian tribes the generally applicable federal criminal laws and related civil enforcement provisions governing gambling. See 18 U.S.C. 1955 ("Prohibition of illegal gambling businesses"); 15 U.S.C. 1172 ("Transportation of gambling devices").

The States also have authority to institute judicial proceedings regarding Indian gaming in certain circumstances. IGRA provides that a State may sue in federal district court "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact * * * that is in effect." 25 U.S.C. 2710(d)(7)(A)(ii). IGRA further allows a Tribal-State compact to provide for the allocation to the State of criminal and civil enforcement authority with respect to class III gaming, 25 U.S.C. 2710(d)(3)(C)(i) and (ii); 18 U.S.C. 1166(d), as well as "remedies for breach of contract," 25 U.S.C. 2710(d)(3)(C)(v). And subject to the limitations of tribal sovereign immunity, the States have authority to enforce applicable state laws in state courts with respect to gambling that occurs outside of Indian country.

2. a. Respondent Bay Mills Indian Community is a federally recognized Indian tribe with a reservation located in Michigan's Upper Peninsula. 77 Fed. Reg. 47,868-47,869 (Aug. 10, 2012); Pet. App. 3a. On August 20, 1993, respondent entered into a Tribal-State

compact with petitioner State of Michigan pursuant to IGRA. 58 Fed. Reg. 63,262 (Nov. 30, 1993); Pet. App. 73a-96a. Shortly thereafter, the NIGC Chairman approved respondent's initial class III gaming ordinance. Tracking the language of IGRA, 25 U.S.C. 2719(a)(1) and (b)(1)(B), Section 5.5A of the ordinance provided that the proposed gaming activity would be located on, *inter alia*, "trust lands which [were] located within or contiguous to the boundaries of the Reservation on October 17, 1988." Bay Mills Indian Community, Mich., Ordinance to Regulate the Operation of Gaming by the Bay Mills Indian Community (1993 Ordinance), § 5.5(A) (Aug. 31, 1993), http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/baymills/ordappr083193.pdf. Pursuant to the ordinance, respondent operates class III gaming facilities on its reservation. Pet. App. 4a.

b. In 1997, Congress passed the Michigan Indian Land Claims Settlement Act (MILCSA) to provide for the use of judgment funds of the Ottawa and Chippewa Indians of Michigan awarded by the Indian Claims Commission. Pub. L. No. 105-143, 111 Stat. 2652. Judgment funds were distributed under MILCSA to respondent and four other tribes. § 104, 111 Stat. 2653.

MILCSA directed respondent's Executive Council to establish a "Land Trust" and to deposit 20% of respondent's judgment funds into the Land Trust. § 107(a)(1), 111 Stat. 2658. The earnings from the Land Trust are to be used "exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange." § 107(a)(3), 111 Stat. 2658. The Act di-

rects that lands acquired pursuant to this provision "shall be held as Indian lands are held." *Ibid.*

c. In August 2010, respondent used Land Trust earnings to purchase land for a gaming facility in the Village of Vanderbilt, Michigan (Vanderbilt Parcel), approximately 125 miles from respondent's reservation. Pet. App. 4a, 22a. Respondent commenced operation of a small gaming facility there on November 3, 2010. *Id.* at 4a.[2]

3. a. On December 21, 2010, petitioner filed a complaint for declaratory and injunctive relief in federal district court to enjoin respondent from operating a class III gaming facility on the Vanderbilt Parcel. J.A. 8-18. Counts I and II alleged that the Vanderbilt Parcel did not constitute "Indian lands" as defined by IGRA; that respondent had therefore violated Section 4(H) of the compact, which provides that "[t]he Tribe shall not conduct any Class III gaming outside of Indian lands"; and that respondent further violated Section 4(C) of the compact, which provides that "[a]ny violation of this Compact, tribal law, IGRA, or other applicable federal law shall be corrected immediately by the Tribe." J.A. 12-15 (emphasis omitted). Count III alleged that respondent violated IGRA by conducting gaming outside of Indian lands and that even if the Vanderbilt Parcel constituted "Indian lands," respondent violated 25 U.S.C. 2719 (and therefore the compact's requirement that gaming comply

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[2] On September 15, 2010, the NIGC Chairwoman approved an amendment to respondent's gaming ordinance (Pet. App. 101a-170a), which respondent submitted after withdrawing a proposed amendment that would have included a site-specific description of the Vanderbilt Parcel in Section 5.5A (J.A. 19-68). See U.S. Invitation Br. 4-6.

with federal law) by operating a gaming facility on land acquired after October 17, 1988 that does not satisfy any of that provision's listed exceptions. J.A. 15-17. Petitioner alleged federal jurisdiction under 25 U.S.C. 2710(d)(7)(A)(ii) and 28 U.S.C. 1331. J.A. 9, 13, 15, 17 (paras. 1(a), 26, 38, 46)).

b. On the same day petitioner filed its complaint, the Solicitor of the Interior issued a legal opinion concluding that the Vanderbilt Parcel is not restricted-fee land eligible for gaming under IGRA and that even if the parcel were held in restricted fee, respondent would still need to demonstrate that it exercised governmental power over the parcel for it to constitute Indian lands. J.A. 69-101; see 25 U.S.C. 2703(4)(B). The Associate General Counsel of the NIGC also issued an opinion, which deferred to the Solicitor's opinion and concluded that because the Vanderbilt Parcel is not Indian lands, the NIGC has no jurisdiction over it. J.A. 102-107. The NIGC accordingly referred the matter to the Governor and Attorney General of Michigan, and to the U.S. Attorney for the Eastern District of Michigan. J.A. 102; see 25 U.S.C. 2716(b); 25 C.F.R. 571.3.

c. The next day, the Little Traverse Bay Bands of Odawa Indians (Little Traverse), which operate a casino approximately 40 miles from the Vanderbilt Parcel, filed a similar complaint that alleged as an additional basis for jurisdiction 28 U.S.C. 1362, which confers jurisdiction over actions brought by Indian tribes arising under federal law. See 1:10-cv-1278 Docket entry No. 1, paras. 15-19, 21-24, 26-29 (W.D. Mich. Dec. 22, 2010). The cases were consolidated. Pet. App. 20a.

4. a. Little Traverse moved for a preliminary injunction, and petitioner filed a brief in support of that motion. Pet. App. 5a, 20a. The district court entered a preliminary injunction. *Id.* at 19a-39a.

Respondent argued that the district court lacked jurisdiction under Section 2710(d)(7)(A)(ii), which provides jurisdiction to "enjoin a class III gaming activity *located on Indian land* and conducted in violation of any Tribal-State compact," because Little Traverse's complaint alleged that the Vanderbilt Parcel was *not* Indian lands. Pet. App. 24a-25a. The district court did not address that issue, but held that it had jurisdiction under 28 U.S.C. 1331 and 1362 because "the complaint * * * requires [the court] to interpret MILCSA § 107(a)(3), obviously a federal law." Pet. App. 25a.

The district court then concluded that Little Traverse was likely to succeed on the merits because MILCSA did not authorize respondent to purchase the Vanderbilt Parcel. Pet. App. 27a-34a. The court further concluded that Little Traverse established that it would suffer irreparable competitive harm and that an injunction was in the public interest. *Id.* at 34a-38a.

b. Respondent appealed and moved for a stay of the injunction, which the district court denied. Br. in Opp. App. 1-11. In its stay motion, respondent argued that sovereign immunity barred the suits. The court acknowledged that neither 28 U.S.C. 1331 nor 28 U.S.C. 1362 clearly abrogated respondent's sovereign immunity. But it concluded that respondent's sovereign immunity was abrogated by 25 U.S.C. 2710(d)(7)(a)(ii), noting that a "majority of courts to consider the issue have found that the 'IGRA waived

tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions [is] at issue and where only declaratory or injunctive relief is sought.'" Br. in Opp. App. 6 (quoting *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379, 1385-1386 (10th Cir. 1997)).

c. On August 9, 2011, while respondent's appeal of the preliminary injunction was pending, petitioner amended its complaint to add three additional claims and to name as additional defendants respondent's Tribal Gaming Commission, the Commission's members in their official capacities, and the members of respondent's Executive Council in their official capacities. Pet. App. 55a-72a. Count IV alleged that the defendants violated federal common law by permitting and operating a casino that exceeds the scope of their authority. *Id.* at 67a-69a. Count V alleged a violation of Mich. Comp. Laws Ann. § 432.220 (West 2001) (failure to obtain a state license for the gaming facility) and sought forfeiture of respondent's gaming machines and the gross receipts from its gaming operation on the Vanderbilt Parcel. Pet. App. 69a-70a. Count VI alleged that operation of the Vanderbilt casino was a public nuisance under state law. *Id.* at 70a-71a.

5. a. The court of appeals vacated the preliminary injunction. Pet. App. 1a-18a. The court concluded that Section 2710(d)(7)(A)(ii) did not provide a basis for jurisdiction. The court explained that Section 2710(d)(7)(A)(ii) provides federal jurisdiction only where all of the following conditions are satisfied:

> (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian

> lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.

Id. at 7a. The court concluded that the third condition was not satisfied because the complaints alleged that the Vanderbilt Parcel is *not* Indian lands. *Ibid.*

The court of appeals also rejected petitioner's alternative claim that even if the Vanderbilt Parcel is Indian lands, gaming is prohibited by 25 U.S.C. 2719, which prohibits gaming on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, subject to listed exceptions. The court explained that "for the casino's operation to violate [Section] 2719—and for federal jurisdiction to exist as to this claim—the casino's operations must be conducted on lands * * * acquired by the Secretary." Pet. App. 10a. The complaints alleged, however, that the Vanderbilt Parcel was acquired by respondent itself, not the Secretary. *Ibid.*

b. The court of appeals next held that the district court had jurisdiction under 28 U.S.C. 1331 over the federal common law and state law claims against respondent alleged in Counts IV-VI of petitioner's amended complaint because each count presented a question of federal law—whether the Vanderbilt Parcel is "Indian lands" under IGRA. Pet. App. 10a-11a (citing *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005)). The court further held, however, that petitioner's claims against respondent are barred by tribal sovereign immunity. *Id.* at 11a-18a. The court explained that "for the same reasons that [Section] 2710(d)(7)(A)(ii) does not supply federal jurisdiction in this case," *i.e.*, because the complaints alleged that the Vanderbilt Parcel is not

Indian lands, "it does not abrogate [respondent's] immunity either." *Id.* at 13a.

The court of appeals remanded for the district court to address petitioner's Counts IV-VI against the additional defendants named in the amended complaint. Pet. App. 17a-18a. Little Traverse's complaint was dismissed with prejudice. Br. in Opp. 6. Although the preliminary injunction was lifted, the United States understands that respondent is not presently gaming on the Vanderbilt Parcel.

SUMMARY OF ARGUMENT

I. Section 2710(d)(7)(A)(ii) provides that federal district courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located *on Indian lands* and conducted in violation of any Tribal-State compact * * * that is in effect." (emphasis added). The statute does not authorize a suit against a tribe to enjoin gaming that takes place off Indian lands.

A. Petitioner tries to bring Counts I-III of its amended complaint within the limited scope of Section 2710(d)(7)(A)(ii) by contending that tribal officials authorized and supervised gaming at the Vanderbilt Parcel while they were on respondent's reservation and that those actions constitute "class III gaming activities on Indian lands." Numerous provisions of IGRA demonstrate, however, that the term "class III gaming activities" refers to the games themselves.

B. Petitioner also invokes the district court's jurisdiction under 28 U.S.C. 1331. Petitioner's claims in Counts I-III, however, do not come within the cause of action contemplated by Section 2710(d)(7)(A)(ii). Furthermore, although IGRA authorizes a State and tribe to include other remedies for breach of contract

in their Tribal-State compacts, 25 U.S.C. 2710(d)(3)(C)(v), and pursuit of those remedies would presumably arise under federal law for purposes of 28 U.S.C. 1331, the compact between petitioner and respondent contains no provision agreeing to federal-court review of disputes arising under the compact. Nor does petitioner contend that IGRA confers an implied right of action by a State against a tribe to enforce IGRA or a compact outside the express provisions of 25 U.S.C. 2710(d)(7)(A)(ii) and (3)(C)(v).

II. A. Petitioner has in any event failed to establish that Congress has abrogated tribal sovereign immunity for any of its claims against respondent. Indian tribes are subject to suit only when Congress abrogates (or the tribe waives) sovereign immunity, and Congress must do so unequivocally.

Because petitioner alleges that the Vanderbilt Parcel is not Indian lands, Section 2710(d)(7)(A)(ii) does not abrogate sovereign immunity for petitioner's suit against respondent. Nor does 18 U.S.C. 1166 abrogate tribal immunity from injunctive suits brought by a State. Section 1166 gives the federal government—not the States—enforcement authority in Indian country for violations of assimilated state gambling laws. It does not allow a State to invoke the jurisdiction of the federal courts to enforce state gambling laws *outside* of Indian country, much less authorize it to sue the tribe itself. Petitioner's further contention that the Court should abandon the unequivocal statement rule for congressional abrogation of sovereign immunity is unfounded.

B. The Court should not create an exception to tribal sovereign immunity for off-reservation commercial activities. The Court's settled precedents recog-

nize that Indian tribes have immunity from suit, including suits for injunctive relief and for their commercial activities, regardless of where those activities take place. Congress, which has carefully balanced the interests of tribes and States and provided a comprehensive statutory foundation for gaming under IGRA, is better equipped to weigh and accommodate the competing policy and reliance concerns in this area. The Court should continue to defer to Congress to make the necessarily complex legislative judgments in this case.

III. There are various ways for the parties to obtain judicial resolution of their underlying dispute. The parties could agree to have a federal court determine the status of the Vanderbilt Parcel through mutual waivers of sovereign immunity. Alternatively, the tribe could pursue an action brought against state officers under *Ex parte Young*, 209 U.S. 123 (1908), or the State could seek injunctive relief against the individuals, including tribal officials, responsible for operating the gaming facility. Such claims in fact are already pending below.

Respondent could also request approval from the NIGC of a site-specific gaming ordinance describing the Vanderbilt Parcel. The NIGC then would decide whether the parcel is eligible for gaming and approve or deny the ordinance, and its decision would be subject to judicial review. Finally, petitioner retains its police powers outside of Indian country and can enforce its state gaming laws against the individuals involved in gaming on the Vanderbilt Parcel in its state courts. There is no need to diminish the important doctrine of tribal sovereign immunity to resolve the parties' dispute.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT COUNTS I-III IN PETITIONER'S COMPLAINT MUST BE DISMISSED

A. Petitioner's Claims Do Not Fall Within Section 2710(d)(7)(A)(ii)

1. Section 2710(d)(7)(A)(ii) provides that federal district courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect."

That provision covers a range of disputes that may arise between a State and a tribe under a gaming compact negotiated pursuant to Section 2710(d)(3)(C). But it does not cover all disputes between a State and tribe related to gaming. Section 2710(d)(7)(A)(ii) does not authorize a suit to enjoin a tribe that undertakes gaming without a Tribal-State compact. Nor could a State sue under that provision to enjoin a class I or class II gaming activity. Similarly, the plain text of the statute does not authorize a suit against a tribe to enjoin gaming that takes place outside of "Indian lands." That limitation reflects the fact that IGRA, including its compacting provisions, was enacted to provide "clear standards [and] regulations for the conduct of gaming *on Indian lands*," 25 U.S.C. 2701(3) (emphasis added), and does not regulate gaming outside of Indian lands. Any such gaming is instead subject to state law, see *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005), just as it was prior to IGRA's enactment, and to generally applicable federal laws such as 18 U.S.C. 1955.

2. Petitioner does not challenge the court of appeals' conclusion that its request for an injunction barring operation of the Vanderbilt facility is not within the scope of Section 2710(d)(7)(A)(ii) because petitioner alleges that the facility is not on "Indian lands." In a belated effort to come within Section 2710(d)(7)(A)(ii), however, petitioner contends (Br. 20-22) that its amended complaint (filed while respondent's appeal of the preliminary injunction was pending) alleges that respondent, through its Executive Council and Tribal Gaming Commission, "authorized, licensed, and operated" the Vanderbilt casino from within its reservation, which is Indian lands. Petitioner contends that those actions are "class III gaming activit[ies] located on Indian lands" that can be enjoined under Section 2710(d)(7)(A)(ii). The provision cannot bear petitioner's interpretation.

Numerous provisions of IGRA demonstrate that the term "class III gaming activity" in Section 2710(d)(7)(A)(ii) refers to the games themselves. For example, Section 2706(a)(5) gives the NIGC authority "to make permanent a temporary order of the Chairman closing a gaming activity," *i.e.*, a temporary order to close "an Indian game" due to substantial violations of IGRA, see 25 U.S.C. 2713(b)(1). Furthermore, Section 2710(b)(4)(A) gives a tribe authority to license and regulate "class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands." And in discussing class III gaming, Section 2710(d)(9) provides that "[a]n Indian tribe may enter into a management contract for the operation of a class III gaming activity." More generally IGRA's regulations and prohibitions are directed to actual gaming activity conducted on Indian lands,

see, *e.g.*, 25 U.S.C. 2701(3); 2702(3), and 2710(d)(1), irrespective of the location of the tribal officials who may authorize or direct it. The authorization or supervision of gaming on the Vanderbilt Parcel by tribal officials while they are on respondent's reservation is not itself "a class III gaming activity located on Indian lands" that may be enjoined under Section 2710(d)(7)(A)(ii).

B. Even If There Is Jurisdiction Over Counts I-III Under 28 U.S.C. 1331, The Claims Were Properly Dismissed

1. Petitioner contends (Br. 22-25) that even if the "Indian lands" requirement of Section 2710(d)(7)(A)(ii) is not satisfied, the district court nevertheless had jurisdiction over Counts I-III under 28 U.S.C. 1331.[3] Petitioner is correct that Section 2710(d)(7)(A)(ii) does not eliminate jurisdiction that federal courts may have under other federal statutes, such as 28 U.S.C. 1331. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998); *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 643-644 (2002). Indeed, for Counts IV-VI in petitioner's amended complaint, which were not brought under

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[3] Petitioner properly does not challenge the court of appeals' dismissal of Count III insofar as it alleged that even if the Vanderbilt Parcel is Indian lands, respondent violated 25 U.S.C. 2719 by operating a gaming facility on land acquired after October 17, 1988, that does not satisfy a listed exception. J.A. 15-17. Section 2719 prohibits gaming on land "acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," but the complaint alleges that the Vanderbilt Parcel was acquired by respondent itself, not by the Secretary, and the land is not held in trust. Pet. App. 10a; Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,355, 29,357 (May 20, 2008) (Interior's interpretation that Section 2719's prohibition applies only to trust, not to restricted-fee, Indian lands).

Section 2710(d)(7)(A)(ii), the court evaluated whether there was jurisdiction under 28 U.S.C. 1331 and concluded that there was. Pet. App. 10a-11a. The court's conclusion that Section 2710(d)(7)(A)(ii) did not provide a basis for Counts I-III turned on the specific pleading requirements of a claim brought under that provision.[4]

2. Beyond the injunctive suit provided for in Section 2710(d)(7)(A)(ii), IGRA authorizes a State and tribe to include in their compact other "remedies for breach of contract." 25 U.S.C. 2710(d)(3)(C)(v). A suit seeking such further remedies for breach of the compact presumably would arise under federal law for purposes of 28 U.S.C. 1331, at least insofar as it concerned activities on Indian lands and therefore within the scope of IGRA. Congress has thus "invite[d] the tribe and State to waive their respective immunities and consent to suit in federal court." *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997), cert. denied, 524 U.S. 926 (1998). That is why the court in *Cabazon Band*, on which petitioner relies (Br. 23-24), could resolve a suit by four Indian tribes against California for monetary relief—recovery of licensing fees that the State had agreed in its compacts to pay over to the tribes. *Id.* at 1053-1054. Those parties had agreed in their compacts that

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[4] Although the court of appeals determined that the defects in petitioner's Section 2710(d)(7)(A)(ii) claims were jurisdictional, the court appears to have interpreted that provision both as conferring a cause of action for violation of the compact and granting federal jurisdiction over that cause of action. Pet. App. 7a (plaintiffs' claims "arise under 25 U.S.C. § 2710(d)(7)(A)(ii)"). The decision therefore may be understood as also holding that petitioner failed to state a claim for purposes of Section 2710(d)(7)(A)(ii) because the elements of such a claim were not properly alleged.

"[j]udicial review of any action taken by either party under this Compact, or seeking an interpretation of this Compact, shall be had solely in the appropriate [federal] District Court." *Id.* at 1057.

The compact between petitioner and respondent, in contrast, contains no provision agreeing to federal court review of disputes arising under the compact or waiving sovereign immunity with respect to such disputes. The compact sets forth an arbitration procedure that the parties may invoke for breach-of-compact claims, states that the procedure does not limit "any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact," and declares that nothing in the compact waives either party's sovereign immunity. Pet. App. 89a-90a. Thus, although petitioner and respondent could have invoked 25 U.S.C. 2710(d)(3)(C)(v) to include in their compact additional remedial provisions that could trigger federal-court proceedings beyond those authorized by 25 U.S.C. 2710(d)(7)(A)(ii), they have not done so.[5] Nor does

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[5] Petitioner also relies (Br. 24) on the Tenth Circuit's decisions in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (1997), and *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, cert. denied, 522 U.S. 807 (1997). In *Pueblo of Santa Ana*, the tribes sued the United States for a declaration that their compacts with New Mexico, approved by the Secretary, were in effect under federal law notwithstanding the state supreme court's holding that the Governor lacked authority to enter the compacts. The tribe was not suing to enjoin gaming, and the court of appeals did not address the scope of Section 2710(d)(7)(A)(ii). In *Mescalero*, the court concluded that it had jurisdiction over the State's counterclaim, brought under Section 2710(d)(7)(A)(ii), seeking to enjoin the tribe's gaming on the ground that, under *Pueblo of Santa Ana*, the compact was invalid. 131 F.3d at 1381. The court read IGRA

petitioner contend that IGRA confers an implied private right of action by a State against a tribe to enforce a compact or IGRA itself outside the express provisions of 25 U.S.C. 2710(d)(7)(A)(ii) and (3)(C)(v).

Petitioner's claims were thus properly dismissed irrespective of whether jurisdiction over those claims could be based on 28 U.S.C. 1331.

II. PETITIONER'S CLAIMS AGAINST RESPONDENT ARE BARRED BY TRIBAL SOVEREIGN IMMUNITY

In any event, all of petitioner's claims against respondent, which fall outside the scope of Section 2710(d)(7)(A)(ii), are barred by tribal sovereign immunity.

This Court has long recognized that an Indian tribe is subject to suit only when Congress has authorized the suit and thus abrogated the tribe's sovereign immunity, or when the tribe has waived its immunity. *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997); *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 782 (1991); *Oklahoma Tax Comm'n* v. *Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes* v. *Wold Eng'g*, 476 U.S. 877, 890-891 (1986); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172-173 (1977); *United States* v. *United States Fid. & Guar. Co.*, 309

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to have abrogated tribal sovereign immunity where compliance with IGRA is at issue and only injunctive or declaratory relief is sought. *Id.* at 1386. The court did not address the text of Section 2710(d)(7)(A)(ii) that limits suits to violations of a compact that is "in effect," or provide any further analysis. We do not believe the State's counterclaim in *Mescalero* fell within the scope of Section 2710(d)(7)(A)(ii).

U.S. 506, 512-513 (1940). The Court has also long required Congress to "unequivocally" express its purpose to abrogate tribal sovereign immunity. See, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58; accord *C & L Enters.* v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Petitioner has failed to identify any statute that abrogates sovereign immunity for its claims against respondent, and petitioner's arguments that this Court should abrogate tribal sovereign immunity should be rejected.

A. IGRA Does Not Abrogate Respondent's Sovereign Immunity With Respect To Petitioner's Claims

1. As the court of appeals correctly concluded, Section 2710(d)(7)(A)(ii) does not abrogate tribal sovereign immunity for petitioner's claims because petitioner alleges that the Vanderbilt Parcel is *not* Indian lands. Pet. App. 13a; *Florida* v. *Seminole Tribe*, 181 F.3d 1237, 1242 (11th Cir. 1999) (IGRA abrogates tribal sovereign immunity only in the "narrow circumstance[s]" specified in the statute).

Recognizing that Section 2710(d)(7)(A)(ii) does not contain the requisite abrogation, petitioner contends (Br. 25-28) that 18 U.S.C. 1166(a), which was enacted in Section 23 of IGRA, 102 Stat. 2487, and assimilates state gambling laws into federal law in Indian country, reflects an assumption on the part of Congress that the States already had authority to invoke the jurisdiction of federal courts to enforce state gambling laws directly against an Indian tribe for violations outside of Indian country. That argument is wrong in several respects.

First, petitioner's argument is based on the flawed assumption that Section 1166 authorizes a State to bring an injunctive action against an Indian tribe

itself for violations of state gambling laws even in Indian country. It does not. Section 1166 assimilates into federal law in Indian country state laws concerning the licensing, regulation, and prohibition of gambling "including but not limited to criminal sanctions applicable thereto." 18 U.S.C. 1166(a). Section 1166(d) provides that the United States has "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact * * * has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe." Although Section 1166(d) does not expressly address the enforcement of civil enforcement provisions provided under state law, that authority also falls exclusively to the United States absent a tribe's consent to State jurisdiction in a Tribal-State compact.

Primary jurisdiction over Indian country rests with the United States absent an Act of Congress affirmatively conferring jurisdiction on the State. See *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998); *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (There is "a deeply rooted policy in our Nation's history of 'leaving Indians free from state jurisdiction and control.'") (internal quotation marks and citation omitted). Section 1166 contains no language affirmatively conferring civil enforcement authority on a State even as against individuals, much less the requisite clear expression of congressional intent to abrogate tribal sovereign immunity and permit a State to enforce state gaming laws against the tribe itself. "Nowhere does [Section

1166] indicate that the State may, on its own or on behalf of the federal government, seek to impose criminal or other sanctions" against an Indian tribe for conduct that violates state gambling laws in Indian country without the tribe's consent. *United Keetoowah Band of Cherokee Indians* v. *Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991). The Michigan Supreme Court agrees. See *Taxpayers of Mich. Against Casinos* v. *State*, 685 N.W.2d 221, 229 (2004) ("[The] federalization of state law regulating gambling does not give a state enforcement power over violations of state gambling laws on tribal lands because the power to enforce the incorporated laws rests solely with the United States.") (internal quotation marks and citation omitted), cert. denied, 543 U.S. 1146 (2005).

The legislative history of Section 1166 confirms that Congress did not intend for the States to have civil enforcement authority in Indian country except to the extent specifically agreed to in Tribal-State compacts. See S. Rep. No. 446, 100th Cong., 2d Sess. 5-6 (1988) (recognizing that tribal governments retain sovereign rights and stating that "[c]onsistent with these principles, * * * unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities").

Furthermore, even if Section 1166 did give the States authority to enforce state laws in federal court for violations that take place *in* Indian country (which it did not), that would not reflect an assumption on the part of Congress that the States already could invoke the jurisdiction of the federal courts to enforce state gambling laws *outside* of Indian country. Congress

has never authorized suits by the States against Indian tribes in federal court for violations of state gambling (or other) laws outside of Indian country, and it does not appear that any such suit would, without more, arise under federal law for purposes of 28 U.S.C. 1331. Rather, the obvious background assumption is that the States would invoke the jurisdiction of their own courts to address such violations, through civil or criminal proceedings under state law against the responsible individuals or corporations.

2. Petitioner further contends (Br. 30-36) that if the provisions of IGRA it has identified are insufficient to show an unequivocal expression of congressional intent to abrogate tribal sovereign immunity for injunctive suits directly against a tribe for illegal gaming outside of Indian country, then the Court should abandon the rule articulated in *Santa Clara Pueblo*, 436 U.S. at 58, that such an abrogation must be unequivocally expressed. Petitioner contends (Br. 31-32) that because the States' sovereign immunity is grounded in the Constitution and the United States' sovereign immunity is grounded in separation of powers, those forms of immunity warrant a clear statement rule while tribal sovereign immunity does not. That argument should be rejected.

The immunity afforded Indian tribes under federal law is a central attribute of the "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). From the beginning of European settlement, Indian tribes were commonly recognized as separate "states" or "nations." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831);

Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). That inherent sovereignty is reflected in the Constitution, which gives the federal government "exclusive authority over relations with Indian tribes." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); see Art. I, § 10, Cl. 1; Art. II, § 2, Cl. 2 (power to make treaties); Art. I, § 8, Cl. 3 (power to regulate commerce with Indian tribes).

It is "inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent." The Federalist No. 81, at 548 (Alexander Hamilton) (Jacob Ernest Cooke ed. 1961) (emphasis omitted). As this Court has recognized, "a weaker power does not surrender * * * its right to self government, by associating with a stronger, and taking its protection." *Worcester*, 31 U.S. at 561. The tribes thus did not lose their inherent sovereignty, including their immunity from suit, when they were brought under the dominant sovereignty and protection of the United States. *Ibid.*; *Cohen's Handbook of Federal Indian Law* § 4.01, at 208 (2005).

Because the sovereignty of Indian tribes is subject to the control of the United States, Congress is "at liberty to dispense with * * * tribal immunity or to limit it." *Potawatomi*, 498 U.S. at 510. That is no reason, however, to require anything less than an unequivocal statement that Congress has done so. Petitioner presents no compelling reason to depart from this Court's longstanding precedent in that regard, which has furnished a background rule against which Congress has enacted many laws.[6]

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[6] Petitioner contends (Br. 33-35) that tribal sovereign immunity should be evaluated similar to foreign sovereign immunity, which petitioner contends is not subject to a clear statement rule for

Petitioner contends (Br. 35) that the courts of appeals have effectively abandoned the unequivocal statement rule and instead have found that Congress abrogated tribal sovereign immunity "whenever IGRA or compact compliance is at issue." See also Alabama *et. al* Amicus Br. (States' Amicus Br.) 19-24. The cases petitioner cites do not support that contention.

In *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (1997), the Tenth Circuit stated that "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Id.* at 1385. But as the court of appeals pointed out and as petitioner conceded below, "*Mescalero* offers virtually no analysis in support" of its reading of Section 2710(d)(7)(A)(ii); and to the extent it did, the Tenth Circuit relied on cases addressing whether a tribe had *waived* its immunity by engaging in gaming under IGRA, not whether Congress had *abrogated* tribal sovereign immunity by the

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abrogation. Petitioner cites *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), but the Court in *Altmann* made clear that it was discussing the standard for determining whether a statute is retroactive, not whether sovereign immunity is abrogated. See *id.* at 686-687 ("The District Court * * * conclud[ed] both that the [Foreign Sovereign Immunities Act (FSIA)] applies retroactively to pre-1976 actions and that the Act's expropriation exception extends to respondent's specific claims. Only the former conclusion concerns us here."). In *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), the Court looked to prior case law to interpret the term "commercial" in the FSIA in conjunction with the "restrictive" theory of foreign sovereign immunity. That is because the FSIA "was not written on a clean slate" but codified pre-existing principles adopted by the Executive. *Id.* at 612-613. Here, there is no such underlying abrogation of sovereign immunity by the political Branches.

terms of IGRA. Pet. App. 13a. The Ninth Circuit's statement in *Lewis* v. *Norton*, 424 F.3d 959 (2005), that "IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with IGRA is at issue," was not a holding but a description of IGRA used to refute the plaintiffs' contention that IGRA contains "a broad waiver of sovereign immunity covering an intra-tribal membership dispute whenever gaming revenues are at stake." *Id.* at 962-963.

The Seventh Circuit in *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933, cert. dismissed, 554 U.S. 944 (2008), *followed* the unequivocal statement rule and concluded that Section 2710(d)(7)(A)(ii) abrogates tribal sovereign immunity only for Tribal-State compact disputes that fall within the ambit of Section 2710(d)(3)(C)(i)-(iv). The court thus concluded that a tribe's immunity was not abrogated with respect to a State's claim that the tribe violated a revenue-sharing provision of the parties' compact because that is not a subject expressly authorized to be negotiated under IGRA. 512 F.3d at 934. And in *Seminole Tribe*, the Eleventh Circuit rejected the notion that Section 2710(d)(7)(A)(ii) "evinces a broad congressional intent to abrogate tribal immunity from any state suit that seeks declaratory or injunctive relief for an alleged tribal violation of IGRA." 181 F.3d at 1242.

In any event, this case would be an unsuitable vehicle for considering whether some expression of congressional intent short of an unequivocal abrogation could ever suffice, because there is *no* indication in any of the provisions of IGRA petitioner identifies that Congress abrogated tribal sovereign immunity for suits against an Indian tribe itself for gaming that

takes place outside of Indian lands. IGRA does not address such gaming at all.

B. There Is No Basis For This Court To Create An Exception To Tribal Sovereign Immunity For Off-Reservation Commercial Activities

Petitioner contends (Br. 36-41) that the Court should itself create an exception to tribal sovereign immunity for off-reservation commercial activities of an Indian tribe. This Court has consistently deferred to Congress on whether to abrogate tribal sovereign immunity in appropriate circumstances, and it should not depart from that course here.

1. To begin with, petitioner is wrong to suggest (Br. 36-37) that the Court's decisions are ambiguous regarding whether tribal sovereign immunity extends to off-reservation conduct or to commercial activities. The Court explained in *Kiowa* that it had previously "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred," 523 U.S. 754, and the Court held in that case that tribes "enjoy immunity from suits on contracts, * * * whether they were made on or off a reservation," *id.* at 760. Similarly, in *Puyallup Tribe*, the courts of Washington had concluded that they had jurisdiction to enforce state laws against an Indian tribe for fishing activities "both on and off its reservation." 433 U.S. at 167. This Court concluded, however, that the fishing regulations at issue could not be enforced in a suit against the tribe itself—for activities both on and off the tribe's reservation. *Id.* at 171-173. The Court has thus recognized that although a State "may have authority to tax or regulate tribal activities occurring within the State but outside Indian country," a tribe nevertheless has immunity from

an enforcement suit. *Kiowa*, 523 U.S. at 755; *ibid.* ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."); cf. *Potawatomi*, 498 U.S. at 514 ("sovereign immunity [can] bar[] the State from pursuing the most efficient remedy").

Furthermore, many of the Court's decisions upholding tribal sovereign immunity have involved commercial activity, including activity that was not contractual in nature. See *Potawatomi*, 498 U.S. at 507 (taxation of cigarette sales); *Puyallup Tribe*, 433 U.S. at 168 (fishing); *United States Fid. & Guar.*, 309 U.S. at 509 (coal mining). The Court's decisions also refute amici's contention (States' Amici Br. 5-11) that tribal sovereign immunity does not extend to suits for injunctive relief. See *Puyallup Tribe*, 433 U.S. at 167 (upholding tribal sovereign immunity to "a temporary restraining order enjoining [the tribe and other defendants] from netting fish in the Puyallup River"). Respondent's immunity from a suit for injunctive relief based on gaming outside of Indian lands is thus established under this Court's precedents.

2. The Court should reject petitioner's invitation to depart from those well-established principles of tribal sovereign immunity. The Constitution vests the power to abrogate or diminish Indian tribes' sovereignty in the political Branches of the national government. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."); *United States* v. *Lara*, 541 U.S. 193, 200-207 (2004). Tribal sovereignty thus retains its full vitality except to the extent that it has been divested through the national

political process. See *Washington* v. *Confederated Tribes*, 447 U.S. 134, 153-154 (1980); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978).

This Court consistently has adhered to that rule. See, *e.g.*, *Kiowa*, 523 U.S. at 754; *Potawatomi*, 498 U.S. at 510 (describing Congress's primary role in defining tribal sovereign immunity). In *Kiowa*, the Court acknowledged petitioner's and amici's concerns (Pet. Br. 38; States' Amicus Br. 11-16) that there may be good reason to modify or abrogate sovereign immunity for a tribe's commercial activities, given the tribes' expanding participation "in the Nation's commerce." 523 U.S. at 758.[7] The Court nevertheless rejected the respondent's request that the Court "confine [tribal sovereign immunity] to reservations or to noncommercial activities." *Ibid.* As the Court explained, "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests," and "[t]he capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by [the Court] in this area." *Id.* at 759. Indeed, the Court has recognized that Congress' consistent "approval of the immunity doctrine * * * reflect[s] Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency

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[7] Tribal gaming under IGRA is not just ordinary commercial activity. IGRA was enacted to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. 2702(1), and IGRA requires that tribal gaming revenues be used only to fund tribal government operations and programs, for the general welfare of the tribe, to promote tribal economic development, and for charitable and local purposes. 25 U.S.C. 2710(b)(2)(B).

and economic development.'" *Potawatomi*, 498 U.S. at 510 (citation omitted).

Petitioner suggests (Br. 39) that it would be appropriate for the Court to displace Congress's traditional primacy in this area because "[o]btaining agreement of both bodies of Congress and the President on new legislation" is becoming increasingly difficult. But Congress has continued to exercise its preeminent authority over tribal sovereign immunity since *Kiowa*. Congress expressly preserved immunity in the Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, § 2(e), 124 Stat. 1101; and the No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1043, 115 Stat. 2076. Congress abrogated sovereign immunity in the Arizona Water Settlements Act, Pub. L. No. 108-451, §§ 213(a)(2), 301, 118 Stat. 3531, 3551, and the Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, § 8(a)(1), 117 Stat. 795. Congress has required tribes to waive immunity in order to exercise regulatory authority under the Surface Mining Control and Reclamation Act Amendments of 2006, Pub. L. No. 109-432, § 209(a), 120 Stat. 3019. And it has required tribes to either disclose or waive sovereign immunity in certain contracts in the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, § 2, 114 Stat. 46-47.

Furthermore, while *Kiowa* was pending, Congress considered, but ultimately declined to enact broad waivers of tribal immunity parallel to the Tucker Act and the Federal Tort Claims Act. See American Indian Equal Justice Act, S. 1691, 105th Cong., 2d Sess. (1998); see also *Sovereign Immunity: Hearing before the S. Comm. On Indian Affairs*, 105th Cong., 2d

Sess. Pts. 1-3 (1998); S. Rep. No. 150, 106th Cong. 1st Sess. 11 (1999). The decision of Congress not to enact such legislation weighs heavily *against* petitioner's suggestion that the Court should take it upon itself to carve out exceptions to tribal sovereign immunity for commercial activities or off-reservation conduct. Doing so would upset the reliance interests of Congress, which has legislated against this Court's longstanding background principles, and of the tribes, that have structured their affairs accordingly.

III. THERE ARE ALTERNATIVE WAYS TO ADJUDICATE THE STATUS OF THE VANDERBILT PARCEL

The underlying dispute between the parties turns on whether the Vanderbilt Parcel constitutes restricted-fee lands and thus "Indian lands" within the meaning of 25 U.S.C. 2703(4). For the reasons described above, that question cannot be resolved in an injunctive action brought directly against the tribe itself, whether under 25 U.S.C. 2710(d)(7)(A)(ii) or otherwise. That does not mean there is no way to resolve the parties' dispute, or that petitioner is left with no way to address gambling conducted by Indian tribes outside of Indian lands and in violation of state law.

The parties could agree to have a federal court determine the status of the land in an action for declaratory or injunctive relief, after agreeing to any necessary waivers of sovereign immunity. Even without such a waiver, injunctive or declaratory relief may also be available against the officers of either party. In that respect, Counts IV-VI in petitioner's amended complaint, raising claims under federal common law and state law, remain pending in the district court against respondent's Tribal Gaming Commission, the Commission's members, and the members of respond-

ent's Executive Council. Pet. App. 17a-18a. Those defendants have asserted in motions to dismiss that sovereign immunity bars petitioner's claims against them. Docket entry No. 171, at 15-16; *id.* No. 174, at 16-21. But the courts below have not passed on that question, and this Court has not held (nor is it the position of the United States) that tribal sovereign immunity would bar an action for injunctive relief against the responsible individuals, including tribal officials, see *Santa Clara Pueblo*, 436 U.S. at 59; *Department of Taxation & Fin.* v. *Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 72 (1994), at least for conduct outside of Indian country.[8] Petitioner is of the view that it would be less respectful to proceed against individual tribal officers. See Pet. Br. 15. Petitioner's desire to avoid acrimony is commendable. But it would stand principles of sovereign immunity on their head to dispense with the immunity of the sovereign itself in order to avoid pursuing available remedies against its officers or other individuals.

Conversely, while respondent's appeal of the preliminary injunction was pending, respondent brought a separate action for declaratory relief against the Governor of Michigan, seeking to adjudicate whether the Vanderbilt Parcel constitutes "Indian lands" under IGRA. Br. in Opp. App. 12-19. That case and this case are before the same district judge. The Governor

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[8] Sovereign immunity could pose an obstacle to proceeding against tribal officials under Count V, which seeks forfeiture of the tribe's gaming machines and the tribe's gross receipts from its gaming operations on the Vanderbilt Parcel. Pet. App. 69a-70a. Relief on that count would run against money in the tribal treasury and other tribal property. Cf. *Edelman* v. *Jordan*, 415 U.S. 651, 666 (1974).

has asserted Eleventh Amendment immunity as a defense. No. 1:11-cv-00729-PLM Docket entry No. 7, at 6 (W.D. Mich. Sept. 30, 2011). The district court may conclude, however, that respondent has properly pleaded claims under the theory of *Ex parte Young*, 209 U.S. 123 (1908), because respondent seeks in that suit to prevent the Governor from enforcing against respondent state laws that respondent alleges are preempted by IGRA's authorization of gaming on Indian lands, which (respondent alleges) include the Vanderbilt Parcel. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008).

Alternatively, respondent could request approval from the NIGC of a site-specific gaming ordinance describing the Vanderbilt Parcel. The NIGC Chairman would decide whether the parcel is eligible for gaming and approve or disapprove the ordinance accordingly. Depending on the outcome, either petitioner or respondent could seek administrative or judicial review of the NIGC's decision. See 25 U.S.C. 2714; 5 U.S.C. 701 *et seq.*; 25 C.F.R. 522.7; 25 C.F.R. Pt. 580; 25 C.F.R. 580.10.

Petitioner could also seek to enforce applicable state laws in state court against the individuals directly involved in gaming on the Vanderbilt Parcel, presenting to the state court its argument that the parcel is outside Indian country and that state law therefore applies to the conduct of the tribal or non-Indian defendants. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 401-402 (1994). Michigan law provides for criminal sanctions against those who maintain gaming rooms, Mich. Comp. Laws Ann. § 750.303(1) (West 2004); civil and criminal penalties against those who conduct gambling operations without a license, *id.* §§ 432.218-432.220

(West 2001); and injunctive relief against use of a building for gambling, *id.* § 600.3801 (West Supp. 2013). Although the tribe itself would remain immune from suit brought under those provisions, see *Puyallup Tribe*, 433 U.S. at 172-173, individual tribal officers or members (and of course non-members) would not be protected by sovereign immunity. See *id.* at 171; *Michigan United Conservations Clubs* v. *Anthony*, 280 N.W.2d 883, 889 (Mich. Ct. App. 1979) (tribal sovereign immunity does not extend to individual members for off-reservation activities).[9]

There are thus various ways for the parties' dispute to be resolved without resorting to drastic alterations of this Court's settled precedent holding that tribal sovereign immunity extends outside of Indian country and to commercial activities, absent waiver or congressional abrogation.

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[9] Petitioner also has available a dispute resolution provision that the parties negotiated in their Tribal-State compact. Pet. App. 89a-90a.

CONCLUSION

The court of appeals decision should be affirmed.

Respectfully submitted.

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OCTOBER 2013

AMICUS CURIAE BRIEF

No. 12-515

In the Supreme Court of the United States

MICHIGAN,

Petitioner,

v.

BAY MILLS INDIAN COMMUNITY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, GEORGIA, HAWAII, IDAHO, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NORTH DAKOTA, RHODE ISLAND, SOUTH DAKOTA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction to enjoin activity that violates the Indian Gaming Regulatory Act ("IGRA") but takes place outside of Indian lands.

2. Whether tribal sovereign immunity bars a State from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. Tribal immunity does not bar lawsuits brought against tribes for declaratory and injunctive relief. 5

A. The Court has never held that tribes are immune from State lawsuits for declaratory and injunctive relief. 6

B. The Court should not extend tribal immunity to prevent States from filing actions for injunctive and declaratory relief. 9

II. The federal courts should be open to resolve disputes between States and Indian tribes 11

A. Disputes have proliferated 11

B. Suits against tribes are the only realistic means to resolve these disputes 16

III. IGRA provides for federal jurisdiction and abrogates tribal immunity 19

A. Michigan's reading of Section 2710(d)(7)(A)(ii) is consistent with IGRA's overall statutory scheme. 20

B. Michigan's reading of IGRA makes the most practical sense.....22

CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
527 U.S. 706 (1999).....11

C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.,
532 U.S. 411 (2001).....22

C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,
532 U.S. 411, 121 S.Ct. 1589 (2001) 9

Calvello v. Yankton Sioux Tribe,
899 F. Supp. 431 (D.S.D. 1995) 21

Cash Advance & Preferred Cash Loans v. Colorado,
242 P.3d 1099 (Colo. 2010) 13

Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes of Tex.,
261 F.3d 567 (5th Cir. 2001) 9

Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians,
148 P.3d 1126 (Cal. 2006).....14

Fair Political Practices Comm'n v. Santa Rosa Indian Cmty. of Santa Rosa Rancheria,
20 Cal. Rptr. 3d 292 (Cal. App. 2004) 14

Florida v. Seminole Tribe of Fla.,
181 F.3d 1237 (11th Cir. 1999).....15, 16

Green v. Bock Laundry Mach. Co.,
490 U.S. 504 (1989).....24

Hollywood Mobile Estates Ltd. v. Cypress,
415 Fed. App'x 207 (11th Cir. 2011) 19

Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,
523 U.S. 751 (1998).....2, 6, 8

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187 U.S. 553 (1903).....10

Maxam v. Lower Sioux Indian Cmty. of Minn.,
829 F. Supp. 277 (D. Minn. 1993) 21

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973).....5

Mescalero Apache Tribe v. New Mexico,
131 F.3d 1379 (10th Cir. 1997).....20, 22, 24

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985).....2, 5

New York v. Shinnecock Indian Nation,
686 F.3d 133 (2d Cir. 2012) 9

Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,
498 U.S. 505 (1991)..... passim

Oliphant v. Suquamish Tribe,
435 U.S. 191 (1978).....10

Pueblo of Santa Ana v. Kelly,
932 F. Supp. 1284 (D.N.M. 1996).....21, 23

Ross v. Flandreau Santee Sioux Tribe,
809 F. Supp. 738 (D.S.D. 1992) 22

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978).....7, 8

Sycuan Band of Mission Indians v. Roache,
54 F.3d 535 (9th Cir. 1995) 18

TTEA v. Ysleta del Sur Pueblo,
181 F.3d 676 (5th Cir. 1999) 8, 9, 24

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484 U.S. 365 (1988).....20

Wisconsin v. Ho-Chunk Nation,
512 F.3d 921 (7th Cir. 2008) 23

Statutes

25 U.S.C. § 2710 .....2, 19, 20, 21

Assimilative Crimes Act, 18 U.S.C. § 13 20

Johnson Act, 15 U.S.C. §§ 1171-1178.....20

Organized Crime Control Act,
18 U.S.C. § 1955.....20

Other Authorities

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Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservations Borders*, 12 LEWIS & CLARK L. REV. 1003 (2008).....14

Amended Complaint (Doc. 10), *Alabama v. PCI Gaming, et al.*, No. 2:13-cv-178 (M.D. Ala. Apr. 11, 2013) 15

Amended Order, *Colorado et al. v. Cash Advance et al.*, No. 05CV1143 (Denver Dist. Ct. Feb. 18, 2012) 13

Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara, 42 U. MICH. J. L. REFORM 651 (2009) 17

Answer (Doc. 9), *Wisconsin v. Ho-Chunk Nation*, No. 3:13-cv-334 (W.D. Wis. Aug. 7, 2013) 16

Brief in Support of Motion to Dismiss (Doc. 14), *Alabama v. PCI Gaming, et al.*, No. 2:13-cv-178 (M.D. Ala. May 9, 2013) 15

Complaint (Doc. 1), *Wisconsin v. Ho-Chunk Nation*, No. 3:13-cv-334 (W.D. Wis. May 14, 2013) 15

Complaint for Declaratory and Injunctive Relief (Doc. 1), *Otoa-Missouria Tribe of Indians, et. al. v. N.Y. State Dep't of Fin. Servs., et. al.*, No. 1:13-cv-05930-RJS (S.D.N.Y. Aug. 21, 2013) 13

Frequently Asked Questions, U.S. DEP'T INTERIOR, BUREAU INDIAN AFF., http://www.bia.gov/FAQs/index.htm 1

Gary Goldsmith, *Big Spenders in State Elections—Has Financial Participation by Indian Tribes Defined the Limits of Tribal Sovereign Immunity from Suit?*, 34 WM. MITCHELL L. REV. 659, 660 (2008) 14

Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, WALL ST. J. (Feb. 10, 2011) 12

Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006) 17

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Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?* 69 WASH. & LEE L. REV. 751, 766-67, 783 (2012) 12

National Indian Gaming Commission, Enforcement Actions 17

New York Attorney General Files Lawsuit Against Payday Lenders, WALL ST. J. (Aug. 12, 2013) 13

Order Denying Motion to Confirm Arbitration Award and Granting Motion to Vacate (Doc. 12), *Wisconsin v Ho-Chunk Nation*, No. 3:12-cv-505 (W.D. Wis. Dec. 5, 2012) 16

S. Rep. No. 100–446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 21

Thomas P. McLish, *Note, Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173 (1988) 9

INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici curiae* States have a sovereign interest in the integrity of their territory and the application of their laws within their borders. The *amici* States also have an interest in protecting their citizens from unlawful gambling, unregulated payday lending, and similar activities. These state interests would be served by a decision reversing the lower court on both questions presented.

The States' interest here does not arise only from the presence of Indian land within their borders. It arises from tribal activities *outside of Indian land within their borders*. The two governments with sovereignty over the land at issue here—the State of Michigan and the United States—have notified the Bay Mills tribe that its gambling activities are unlawful. But the tribe has continued those activities within Michigan's own sovereign territory. When a tribe engages in unlawful activity within a State's own territory, States must have some forum in which to hold tribes accountable, and official-capacity suits and criminal prosecutions are not sufficient.

The Court should allow States to sue tribes for declaratory and injunctive relief, notwithstanding tribal immunity. This dispute is not an isolated occurrence, and the problem is not limited to gambling. According to the Bureau of Indian Affairs, "there are 566 federally recognized American Indian and Alaska Native tribes and villages." *Frequently Asked Questions*, U.S. DEP'T INTERIOR, BUREAU INDIAN AFF., http://www.bia.gov/FAQs/index.htm (last visited Sept. 6, 2013). These tribes have a "unique status" as federal protectorates, and they

can invoke that status to engage in commercial activities in any of the 50 States. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851-52 (1985). They have built everything from brick-and-mortar casinos to Internet-based banks, based on the perception that they can evade federal and state regulations within state territory.

No efficient dispute-resolution system would deprive States a forum for resolving disputes concerning actions tribes take on state land. And Congress did not create such an inefficient system. It expressly provided that the federal courts would have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin" unlawful gambling under IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii). The lower court's reading of this provision—holding that it applied to suits only for violations that are indisputably on Indian land—makes no sense. By ensuring that States would have a federal-court remedy for unlawful gambling on Indian land, Congress did not eliminate the States' remedy for the much more serious issue of unlawful gambling within the State's own territory.

The *amici* States ask the Court to adopt a commonsense application of IGRA and to clarify the limits of tribal immunity. Unlike state sovereign immunity and Eleventh Amendment immunity, the doctrine of tribal immunity "developed almost by accident" through federal common law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). The Court should not extend the "slender reed" of tribal immunity any further. *Id.* at 757. It should resolve this case by reversing the court of appeals

and holding that federal courts can enjoin tribal activities that violate state and federal law.

SUMMARY OF THE ARGUMENT

The Court should reverse the lower court for three reasons, in addition to those highlighted by Michigan's brief.

1. The Court has held that tribes are immune from suits for damages, but the Court has not extended tribal immunity to bar suits filed by States for prospective relief. The closest the Court has come to extending tribal immunity to suits for prospective relief was in a case about tribal membership. That case raised special considerations of tribal sovereignty that are not present in all cases for declaratory and injunctive relief, especially when the challenged conduct occurs off of Indian lands. The Court should not now extend tribal immunity to categorically bar suits for prospective relief. The lower courts have not uniformly done so. Indeed, the Fifth Circuit has rightly recognized that the two principles that underlie tribal immunity—conservation of resources and inherent sovereignty—do not justify tribal immunity when the requested relief is prospective only.

2. The Court should decline to extend tribal immunity to suits for prospective relief so that the judiciary can resolve serious conflicts between States and tribes. The Court has held that tribes must comply with generally applicable state and federal laws. But tribal immunity is often raised as a

defense to lawsuits seeking to compel tribal compliance. This has led to unresolved disputes over Internet-based tribal payday lending, disputes over tribal compliance with state campaign-finance laws, and disputes about unlawful gambling like the case at hand. There are no good options for resolving these lingering disputes. Federal authorities have failed to act when tribes and tribal businesses have violated the law, as evidenced by the federal authorities' lack of meaningful response in this case. Likewise, state criminal prosecutions and official-capacity lawsuits are lesser remedies that do not always resolve the underlying legal dispute.

3. Even if the Court does extend tribal immunity to suits for prospective relief as a general matter, the Court should hold that Congress waived tribal immunity for state lawsuits to compel a tribe's compliance with IGRA. The structure of IGRA makes it clear that IGRA broadly waived tribal immunity for such suits. This is also the most practical reading of IGRA's grant of federal jurisdiction. The lower court's decision would anomalously provide a federal remedy for lesser violations of IGRA (such as gambling that is barred by a compact), while denying a federal remedy for much more serious violations (such as gambling without a compact at all). The best reading of IGRA is that Congress provided for federal jurisdiction and waived tribal immunity for all suits where compliance with IGRA's provisions is at issue.

ARGUMENT

The lower court's approach to tribal immunity, IGRA, and federal jurisdiction finds no purchase in this Court's precedents. The Court has recognized that, even in the absence of an express federal statute, "a federal court may determine under § 1331 whether a [tribe] has exceeded the lawful limits" of its power under federal law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985). And this Court has never applied tribal immunity to bar an action like the one at issue here for purely injunctive and declaratory relief. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 516 (1991) (Stevens, J., concurring). For reasons relating to tribal immunity in general and IGRA in particular, this Court should reverse.

I. Tribal immunity does not bar lawsuits brought against tribes for declaratory and injunctive relief.

As a general matter, tribal immunity should not extend to suits by States against tribes for declaratory and injunctive relief. There is a tension in this Court's jurisprudence concerning the respective powers of Indian tribes and States. On the one hand, the Court has rightly concluded that Indian tribes and their members must comply with nondiscriminatory state laws when their conduct occurs off of Indian lands. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Okla. Tax*

Comm'n, 498 U.S. at 510-11. On the other hand, this Court has held that tribes are immune from civil suits for damages based on their activities off of Indian lands. *See Kiowa*, 523 U.S. at 760. Many lower courts have extended this rule, as the lower court did here, to encompass suits for declaratory and injunctive relief. The upshot is that, although this Court has held that States have the power to regulate tribes' conduct off of Indian lands, States are, in practice, prohibited from doing so. The way to fix this stalemate is to allow suits against tribes for prospective relief.

A. The Court has never held that tribes are immune from State lawsuits for declaratory and injunctive relief.

There is no doubt that, under current law, properly recognized Indian tribes enjoy immunity from damages suits except where Congress has abrogated it or the tribes choose to waive it. *See Kiowa*, 523 U.S. at 754. But this is not a case for damages, and it is not brought by an individual plaintiff. In holding that tribes have immunity from suits brought by States for declaratory and injunctive relief, the lower court extended tribal immunity further than is warranted by this Court's precedents.

This Court has never held that tribal immunity bars an action by a State for declaratory and injunctive relief. In fact, as Justice Stevens noted in his concurrence in *Oklahoma Tax Commission*, the Court has implicitly rejected that premise. There, an

Indian tribe sought an injunction to prevent Oklahoma from enforcing a judgment of $2.7 million for a past-due tax on cigarette sales. Oklahoma then counterclaimed for the $2.7 million in past-due cigarette tax. The Court held that Oklahoma could not sue for the past-due tax because tribal immunity barred the counterclaim. *See Okla. Tax Comm'n*, 498 U.S. at 509-11. That decision could have resolved the case. But the Court went on to determine whether the tribe had an obligation to pay the tax and declared that the State could impose a cigarette tax on the Indians' sales to nonmembers of the Tribe even if the sales took place on Indian land. *Id.* at 513. Justice Stevens' concurring opinion emphasized, without comment by the majority, that "[b]y addressing the substance of the tax commission's claim for prospective injunctive relief against the Tribe, the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief." *Id.* at 516 (Stevens, J., concurring).

The closest this Court has come to extending tribal immunity to suits for prospective relief is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In *Santa Clara Pueblo*, a female tribal member brought suit under the Indian Civil Rights Act to compel the tribe to grant her children tribal membership on the same terms as children of male tribal members. *Id.* at 51. The Court held that the tribe had immunity from suit because "[n]othing on the face" of "the ICRA" provides federal jurisdiction "in civil actions for injunctive or declaratory relief." *Id.* at 59. But the Court arrived at that holding by

examining the specifics of the ICRA in the context of the facts of that case.

The immunity discussion in *Santa Clara Pueblo* does not stand for the general proposition that tribes are immune from suit for prospective injunctive relief. The Court there did not consider the issue outside of the context of the ICRA. The immunity holding was also unnecessary to the decision, because the Court went on to hold that the plaintiff had no express or implied cause of action to enforce the ICRA anyway. *Id.* at 69. And the Court's decision was driven by the lawsuit's presumed effect on the tribe's internal and social relations. *See id.* at 59 ("[S]ubject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves, may . . . infringe on the right of the indians to govern themselves." (internal quotation marks and citations omitted)). The Court did not consider whether tribal immunity extended to other contexts where a tribe could not reasonably be said to be exercising its sovereign authority or was subject to pervasive state and federal regulation as in *Oklahoma Tax Commission*.

The Court reaffirmed tribal immunity in *Kiowa*, but again had no occasion to extend the doctrine to suits about prospective relief. *Kiowa* held that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa*, 523 U.S. at 756. Unlike States, as the Fifth Circuit has explained, a tribe "has sovereign immunity from an award of damages only." *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999). The court noted that *Kiowa* "was an action for damages, not a

suit for declaratory or injunctive relief. This difference matters." *Id.* "The distinction between a suit for damages and one for declaratory or injunctive relief," the Fifth Circuit reasoned, "is eminently sensible, and nothing in *Kiowa* undermines the relevant logic." *Id.*; *accord Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 571-72 (5th Cir. 2001) ("[T]he district court erroneously concluded that the Tribe was entitled to sovereign immunity against oil companies' claims for equitable relief."); *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 147 (2d Cir. 2012) (Hall, J., dissenting) ("There is nothing in the factual record of *Kiowa* that would require the holding be extended to suits by states seeking prospective relief against a tribe."). *Cf.*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594 (2001) ("Tribal immunity, we ruled in *Kiowa*, extends to suits on off-reservation commercial contracts.").

B. The Court should not extend tribal immunity to prevent States from filing actions for injunctive and declaratory relief.

The Court should not extend tribal immunity to suits for prospective relief. There are two rationales for tribal immunity: (1) the conservation of tribal resources and (2) tribes' inherent sovereignty. *See* Thomas P. McLish, *Note, Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173,

178-79 (1988) (collecting cases). Neither of these rationales justifies extending tribal immunity to suits brought by States for declaratory and injunctive relief.

To the extent tribal immunity protects a tribe's resources, there is no reason to apply tribal immunity to an action for declaratory and injunctive relief brought by a State. This case, for example, does not request that the Tribe pay anything to Michigan. Instead, Michigan merely seeks an injunction that compels the tribe to comply with applicable federal and state law going forward.

The sovereignty rationale also does not support tribal immunity against a declaratory or injunctive action brought by a State. Unlike States, tribes are *dependent* sovereigns under the "[p]lenary authority" of the federal government. *See Okla. Tax Comm'n*, 498 U.S. at 509 ("Indian tribes are 'domestic dependent nations.'"); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("plenary authority"). Their sovereignty is neither directly addressed nor guaranteed in the Constitution. Instead, "[u]pon incorporation into the territory of the United States, the Indian tribes thereby c[a]me under the territorial sovereignty of the United States." *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978). Given the federal government's plenary power to create, destroy, and otherwise control the tribes, notions of inherent sovereignty do not justify immunity from litigation. A federal court, no less than the federal Congress, can coerce an Indian tribe's obedience without diminishing the tribe's uniquely "dependent" sovereignty.

The sovereignty rationale is especially lacking when, as here, a State is the plaintiff. The Court has recognized that sovereign suits are inherently different from private suits because they are the result of a political process. As the Court explained in *Alden v. Maine*, suits by one sovereign against another are preferred as "an alternative to extralegal measures," such as war, and "require the exercise of political responsibility for each suit prosecuted . . . which is absent from a broad delegation to private persons to sue." 527 U.S. 706, 756 (1999). Moreover, the Court has held that States can regulate tribal activity—even on the reservation itself—when that activity affects non-Indians. *See Okla. Tax Comm'n*, 498 U.S. at 513. It does not undermine tribal sovereignty to subject tribes to actions for declaratory and injunctive relief in federal court.

II. The federal courts should be open to resolve disputes between States and Indian tribes.

It has been 15 years since the Court reaffirmed tribal immunity in *Kiowa*, and state-tribal disputes have swelled and intensified in the meantime. The best way to resolve these and other areas of persistent state-tribe conflict is for the Court to hold that tribal immunity does not bar suits brought by States for declaratory and injunctive relief.

A. Disputes have proliferated.

Because many lower courts have extended this Court's grant of immunity in *Kiowa* to lawsuits for

declaratory and injunctive relief, the number of unresolved controversies between states and tribes has grown. The following examples are some of the more serious areas of conflict that could be alleviated if a federal judicial forum were available.

1. Payday lending. Payday lending over the Internet is one of the biggest areas of contention between States and tribes. Tribal ownership of an online payday lending company purportedly limits state control, allowing tribal lenders to escape regulation and market products to consumers nationwide. In 2010, tribal payday lenders made up "[m]ore than 35 of the 300" Internet payday lenders and made "about $420 million in payday loans." Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, WALL ST. J. (Feb. 10, 2011). "Some observers predict that the number of tribes with payday-loan operations eventually could climb close to the 400 that now have casinos." *Id.* And there is good evidence that tribal lenders are organized under "rent-a-tribe" schemes solely for the anti-regulatory benefits of tribal ownership. Under those schemes, existing nontribal lenders affiliate with tribes to evade laws and oversight. *See* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?* 69 WASH. & LEE L. REV. 751, 766-67, 783 (2012).

The conflict between States and tribal payday lenders has exploded into litigation in several States with uncertain results. Several years ago, the Attorney General of Colorado issued investigative subpoenas to two out-of-state Internet payday

lenders, Cash Advance and Preferred Cash Loans. *See Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1102 (Colo. 2010). Two tribal entities appeared in the case, claimed that they were related to the lenders being investigated by Colorado, and asserted tribal immunity on behalf of the lenders as "arms" of their respective tribes. *Id.* The trial court found that an existing payday lender had recruited the tribes and continued to make 99% of the profits from the lending, but the court nonetheless dismissed Colorado's investigation on the grounds of tribal immunity. *See* Amended Order, *Colorado et al. v. Cash Advance et al.*, No. 05CV1143 (Denver Dist. Ct. Feb. 18, 2012).[1]

More recently, in August of 2013, the New York Department of Financial Services sent cease-and-desist letters to online tribal payday lenders and warned third-party banks not to process payments to them. *See* Complaint for Declaratory and Injunctive Relief (Doc. 1), *Otoa-Missouria Tribe of Indians, et. al. v. N.Y. State Dep't of Fin. Servs., et. al.*, No. 1:13-cv-05930-RJS (S.D.N.Y. Aug. 21, 2013). The dispute has spawned two lawsuits. The Attorney General of New York has sued a subset of purported tribal lenders in state court, and another subset of tribal payday lenders has sued the Department in federal court for an injunction against the Department's actions. *See id.; New York Attorney General Files Lawsuit Against Payday Lenders*, WALL ST. J. (Aug. 12, 2013).

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[1] *Available at* http://www.nclc.org/images/pdf/unreported/Co_v_Cash_Advance.pdf. (last visited Sept. 6, 2013)

2. Campaign Finance. Well-financed Indian tribes are significant contributors to political campaigns, and some have claimed authority to disregard state campaign-finance disclosure laws. *See* Gary Goldsmith, *Big Spenders in State Elections—Has Financial Participation by Indian Tribes Defined the Limits of Tribal Sovereign Immunity from Suit?*, 34 WM. MITCHELL L. REV. 659, 660 (2008). In the 2000s, California's Fair Political Practices Commission sued the Agua Caliente Band of Cahuilla Indians over $7,500,000 in alleged unreported campaign contributions to state politicians. *See Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians*, 148 P.3d 1126, 1128-29 (Cal. 2006). Other tribes had similarly been flouting California's campaign-finance reporting system. *E.g.*, *Fair Political Practices Comm'n v. Santa Rosa Indian Cmty. of Santa Rosa Rancheria*, 20 Cal. Rptr. 3d 292 (Cal. App. 2004). The Band moved to dismiss the suit on the grounds of tribal immunity, arguing that the State could not compel disclosure nor impose fines. *Id.* Although the California Supreme Court rejected the claim of immunity based on reasoning specific to campaign finance, *id.*, the court's decision is in substantial tension with the precedents of several federal courts of appeals.[2]

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[2] *See* Mary-Beth Moylan, *Sovereign Rules of the Games: Requiring Campaign Finance Disclosure in the Face of Tribal Sovereign Immunity*, 20 B.U. PUB. INT. L.J. 1, 13 (2010) (arguing that "the distinction" between campaign finance and other areas "is a thin one" and proposing federal legislation to abrogate immunity); Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservations Borders*, 12 LEWIS & CLARK L. REV. 1003, 1036 (2008) (criticizing California courts as "overreaching").

3. Gambling. "[A] substantial amount of litigation" has been filed about the "difference between Class II and Class III gaming." Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, 60 Fed. Lawyer 35, 38 (April 2013). The issue is important because gambling devices that "can be classified as Class II" under IGRA "do[] not need to be approved by a state pursuant to a tribal state compact." *Id.* For this reason, States prefer a narrow reading of Class II, and tribes prefer a broader one. The federal courts are the right forum to resolve this dispute, and there are at least two pending lawsuits by States against tribes over the question. Both suits face hurdles of tribal immunity.

Alabama has sued officials of a tribe that operates gambling devices that are materially identical to Las Vegas slot machines. *See* Amended Complaint (Doc. 10), *Alabama v. PCI Gaming, et al.*, No. 2:13-cv-178 (M.D. Ala. Apr. 11, 2013). Alabama's complaint alleges that these machines are unlawful Class III slot-machine gambling, rather than lawful Class II bingo. But Alabama has been forced by Eleventh Circuit caselaw to name a laundry-list of tribal officials as defendants instead of the tribe itself. *See Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999). Even so, the individual defendants have raised tribal immunity in a motion to dismiss. *See* Brief in Support of Motion to Dismiss (Doc. 14), *Alabama v. PCI Gaming, et al.*, No. 2:13-cv-178 (M.D. Ala. May 9, 2013).

Similarly, the State of Wisconsin has sued a tribe for operating illegal electronic-poker games. *See*

Complaint (Doc. 1), *Wisconsin v. Ho-Chunk Nation*, No. 3:13-cv-334 (W.D. Wis. May 14, 2013). Although Wisconsin has a compact with its defendant-tribe, that compact by definition does not provide for the tribe's unlawful gambling. For this reason, a federal district court held that Wisconsin could not invoke the compact's arbitration clause. *See* Order Denying Motion to Confirm Arbitration Award and Granting Motion to Vacate (Doc. 12), *Wisconsin v Ho-Chunk Nation*, No. 3:12-cv-505 (W.D. Wis. Dec. 5, 2012). Similarly, the defendant-tribe has argued that Wisconsin's lawsuit is outside the scope of federal jurisdiction because it does not seek to "enjoin a class III gaming activity located on Indian lands *and conducted in violation of any Tribal-State compact*." *See* Answer (Doc. 9), *Wisconsin v. Ho-Chunk Nation*, No. 3:13-cv-334 (W.D. Wis. Aug. 7, 2013) (emphasis added).

B. Suits against tribes are the only realistic means to resolve these disputes.

The lower court acknowledged the serious consequences of denying a federal forum to States seeking to ensure compliance with federal and state law within their own territory. Pet. App. 17a. *Accord Seminole Tribe*, 181 F.3d at 1243 (recognizing that its "holding will effectively nullify [the State's] rights under IGRA by leaving it with no forum in which it can prevent the Tribe from violating IGRA with impunity"). But the lower court purported to identify three possible ways in which States could compel the

tribes to comply with the law apart from federal lawsuits. None is a realistic alternative.

1. *Relying on the federal government.* First, the lower court suggested that Michigan "ask the United States to sue Bay Mills, since tribes are not immune from suits brought by the federal government." Pet. App. 17a. Unfortunately, federal authorities are notoriously unwilling to act in this area. Surveys suggest that U.S. Attorneys decline to prosecute approximately 85% of felony cases arising on Indian lands. *See* Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara, 42 U. MICH. J. L. REFORM 651, 691 (2009). Gambling crimes, in particular, are "rarely prosecuted." Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 715 n.20 (2006). Similarly, the National Indian Gaming Commission only rarely invokes its authority to enforce the law against Indian tribes. Although hundreds of tribes operate gambling establishments with varying degrees of compliance, the NIGC reports ordering only ten temporary closures over its 25-year history. *See* National Indian Gaming Commission, Enforcement Actions, at http://www.nigc.gov/Reading_Room/Enforcement_Actions.aspx (last visited Sept. 6, 2013). The most recent was seven years ago, in 2006.

The facts of this case underscore why States cannot rely on federal authorities. The NIGC and the Department of the Interior have both determined that the Bay Mills tribe is engaged in unlawful gambling. JA 101a-102a. But the federal government has not joined Michigan's lawsuit as a plaintiff.

Instead, incredibly, the federal government has taken the opposite tack; it has appeared as an *amicus curiae* in support of the tribe. *See* Br. of USA as Amicus Curiae.

2. *Criminal prosecutions against individuals.* The lower court also suggested that Michigan "apply non-discriminatory laws against Indians who go beyond the boundaries of Indian country, so long as there is no federal law to the contrary." Pet. App. 17a. In other words, the lower court suggested that Michigan arrest and prosecute the casino's patrons, serve warrants to seize the casino's gambling devices, or initiate state-court enforcement proceedings to stop the Tribe's unlawful gambling.

This suggestion suffers from two serious problems. First, law-enforcement measures necessarily transform good-faith legal disagreements into court proceedings about *mens rea*, criminal procedure, and other side issues. The upshot is that a State could be correct that a tribe's activities are unlawful, but could still lose a criminal case against a particular tribe-member. Second, even if the State were able to litigate a prosecution or forfeiture proceeding against specific contraband to a judgment, it would still lack a binding judgment against the tribes and tribal businesses that are the driving force behind the activity. For these reasons, state law-enforcement tactics have provided clarity in the past only when they have provoked a tribe into waiving its immunity and suing a State. *See, e.g.*, *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995).

3. *Official-capacity lawsuits.* Finally, the lower court suggested that "a State may bring claims against tribal officers in their official capacity." Pet. App. 17a. Michigan has convincingly explained why these official-capacity lawsuits are a secondary and uncertain remedy. Suppl. Br. on Pet. for Cert. at 8. Moreover, because of the way in which tribes and tribal businesses are organized, it is often not apparent which official should be named. Unlike States and the federal government, tribal governments and businesses tend to be governed by committees and commissions, not individual executive officers. *See, e.g., Hollywood Mobile Estates Ltd. v. Cypress*, 415 Fed. App'x 207 (11th Cir. 2011) (rejecting the argument that a tribal official could not be enjoined because he was only a constituent member of a tribe's governing council).

III. IGRA provides for federal jurisdiction and abrogates tribal immunity.

Regardless of whether States can sue tribes for declaratory and injunctive relief as a general matter, IGRA specifically gave States the power to sue to stop unlawful Class III gambling. Section 2710(d)(7)(A)(ii) provides that the federal courts can hear "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). This provision, by its terms, waives tribal immunity and authorizes federal jurisdiction in at least some state-tribal confrontations over

Indian gaming. That is beyond dispute. And for the reasons described below, the best reading of this section, and of IGRA as a whole, is that it abrogates "tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue." *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997).

A. Michigan's reading of Section 2710(d)(7)(A)(ii) is consistent with IGRA's overall statutory scheme.

As an initial matter, the lower court's narrower reading of Section 2710 is inconsistent with IGRA's statutory scheme. Statutory construction "is a holistic endeavor," such that a provision in isolation "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Michigan's brief explains IGRA's balance between three different "classes" of gambling. Pet. Br. 3-7. IGRA authorizes gambling only if that gambling is conducted on "Indian Lands." *See* 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2). IGRA exempted Indian tribes from preexisting prohibitions on gambling, but only if the tribes met certain conditions. *See* Johnson Act, 15 U.S.C. §§ 1171-1178 (prohibiting gambling devices on Indian lands); Organized Crime Control Act, 18 U.S.C. § 1955 (making most organized gambling activity a federal

crime); Assimilative Crimes Act, 18 U.S.C. § 13 (making it a crime to violate most state laws on federal lands). Under IGRA, Indian tribes can engage in Class II gambling if the activities are (1) "located within a State that permits such gaming for any purpose by any person, organization or entity" and (2) not "otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1). Tribes can engage in Class III gambling if (1) there is an approved tribal ordinance, (2) the activities are "located in a State that permits such gaming for any purpose," and (3) the tribe and State "enter[] into" a compact. 25 U.S.C. § 2710(d)(1)(A)-(C).

These limitations "balance the states' interest in regulating high stakes gambling within their borders and the Indians' resistance to state intrusions on their sovereignty." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1289 (D.N.M. 1996); *see also* S. Rep. No. 100–446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. Congress tied the legality of both classes of gambling to state law and state permission. Against this backdrop, it stands to reason that the best reading of Section 2710(d)(7)(A)(ii) is that, when a tribe invokes its right to conduct gambling under IGRA, a State can sue to ensure that the tribe complies with the terms of the Act.[3]

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[3] *See Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 438 (D.S.D. 1995) ("Federal courts may find a waiver of tribal sovereign immunity for the purpose of enforcing the provisions of the IGRA where prospective injunctive relief, and not monetary relief, is sought."); *Maxam v. Lower Sioux Indian Cmty. of Minn.*, 829 F. Supp. 277 (D. Minn. 1993) ("Any tribe which elects to reap the benefits of gaming authority created by

The structure and text of IGRA evidences that a tribe's immunity from suit is waived "where compliance with IGRA's provisions is at issue." *Mescalero*, 131 F.3d at 1385. In *Santa Clara Pueblo*, there was "nothing on the face" of the civil rights act that even "purport[ed]" to subject tribes to suit other than through habeas corpus. The same cannot be said here. Instead, IGRA creates a regulatory regime that imposes real limits on tribal gambling and requires meaningful State consent—through a compact—before Class III gambling is allowed.

B. Michigan's reading of IGRA makes the most practical sense.

This Court has held that the scope of tribal-immunity waivers must be evaluated in light of "the real world end" they are meant to achieve. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 422 (2001). But the lower court's "heads-I-win-tails-you-lose" style of reasoning would eliminate the usefulness of Section 2710(d)(7)(A)(ii) as a means of dispute resolution.

The lower court held that States can only sue to enforce IGRA if their lawsuit meets five conditions: "(1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming

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the IGRA must comply with the Act's requirements."); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (D.S.D. 1992) ("[T]he Tribe cannot reap the benefits of the IGRA and simultaneously refuse to comply with the statutorily mandated provisions relating to the distribution of Indian gaming revenues.").

activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal–State compact; and (5) the Tribal–State compact is in effect." Pet. App. 7a. Under the lower courts' rule, federal courts would not be able to resolve lawsuits in which any of these five elements are disputed by the plaintiff. Although federal courts would be able to resolve less consequential and clear-cut disputes, there would be no judicial forum to resolve serious foundational disputes such as tribal gambling without a compact, the use of certain land for gambling, the *ab initio* validity of a state-tribe compact, or the enforceability of revenue-sharing agreements under the compact. *Compare Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997) (under the correct rule, courts can determine whether a state compact is void or in effect) *with Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008) (under an erroneous rule, courts cannot determine whether a tribe is complying with a revenue-sharing agreement under a compact). There is no reason that Congress would have wanted courts to resolve lesser disputes—about gambling clearly covered by a valid compact, and occurring on Indian Lands—but not the more foundational ones that would be excluded by the lower court's five-part test.

Moreover, the lower court's rule would anomalously give States no remedy for the most egregious violations of IGRA *for the very reason that they are egregious violations*. For example, perhaps the most serious violation of IGRA is for a tribe to engage in Class III gambling without a compact. But under those circumstances, the lower court would

leave the State without a remedy for the very reason that the tribe's gambling is unlawful—the absence of a compact. *See* Pet. App. 7a (requiring that a "Tribal–State compact [be] in effect" for federal jurisdiction).

Similarly, Michigan is left without a remedy to stop the Bay Mills tribe from gambling outside of Indian lands for the very reason that the gambling is illegal in the first place—because it is outside of Indian lands. This outcome makes no sense; a tribe should not be able to defeat a lawsuit to enforce IGRA on the grounds that the tribe is so far out of compliance with IGRA that the resulting lawsuit is not within the literal terms of Section 2710(d)(7)(A)(ii). *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) (reading statute to avoid "unfathomable" and absurd result).

* * *

The Court should adopt a pragmatic approach to tribal immunity and IGRA that allows courts to resolve serious disputes about the limits of tribal authority and a tribe's compliance with generally applicable law. The lower court has extended the common law of tribal immunity further than this Court's precedents warrant or that the principles that undergird the doctrine allow. A tribe "has sovereign immunity from an award of damages only." *TTEA*, 181 F.3d at 680. And IGRA, at the very least, evinces Congress's intent that federal courts resolve disputes "where compliance with IGRA's provisions is at issue." *Mescalero*, 131 F. 3d at 1385.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-515

RECORD AND BRIEFS

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STATE OF MICHIGAN,
Petitioner,

v.

BAY MILLS INDIAN COMMUNITY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE NATIONAL INDIAN GAMING ASSOCIATION, THE AFFILIATED TRIBES OF NORTHWEST INDIANS, THE COUNCIL FOR ATHABASCAN TRIBAL GOVERNMENTS, AND 51 FEDERALLY RECOGNIZED INDIAN TRIBES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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National Indian Gaming Association
Affiliated Tribes of Northwest Indians
Council of Athabascan Tribal Governments

FEDERALLY RECOGNIZED TRIBES

Alturas Indian Rancheria
Big Sandy Rancheria of Mono Indians of California
Bois Forte Band of Chippewa
Buena Vista Rancheria of Me-Wuk Indians-Historical of California
Cabazon Band of Mission Indians
Confederated Salish and Kootenai Tribes of the Flathead Reservation
Elk Valley Rancheria, California
Ewiiaapaayp Band of Kumeyaay Indians
Flandreau Santee Sioux Tribe
Grand Traverse Band of Ottawa and Chippewa Indians
Greenville Rancheria
Ho-Chunk Nation
Kialegee Tribal Town
Kootenai Tribe of Idaho
Little River Band of Ottawa Indians
Little Traverse Bay Bands of Odawa Indians
Lower Elwha Klallam Tribe
Mandan, Hidatsa & Arikara Nation (Three Affiliated Tribes of Fort Berthold Reservation)
Match-e-be-nash-she-wish Band of Pottawatomi Indians
Miami Tribe of Oklahoma
Mississippi Band of Choctaw Indians
Modoc Tribe of Oklahoma
Nez Perce Tribe
Nottawaseppi Huron Band of Potawatomi
Paskenta Band of Nomlaki Indians
Pechanga Band of Luiseño Indians
Picayune Rancheria of the Chukchansi Indians
Pokagon Band of Potawatomi Indians
Prairie Band Potawatomi Nation
Pueblo of Laguna
Puyallup Tribe of Indians

Red Lake Band of Chippewa Indians
Redding Rancheria
Saginaw Chippewa Indian Tribe of Michigan
San Manuel Band of Mission Indians
San Pasqual Band of Mission Indians
Santee Sioux Nation
Scotts Valley Band of Pomo Indians
Shakopee Mdewakanton Sioux Community
Sisseton Wahpeton Sioux Oyate
Southern Ute Indian Tribe
Spokane Tribe of Indians
Suquamish Tribe
Swinomish Indian Tribal Community
Tejon Indian Tribe
The Confederated Tribes of the Warm Springs Reservation of Oregon
Walker River Paiute Tribe
Wampanoag Tribe of Gay Head (Aquinnah)
White Mountain Apache Tribe
Winnebago Tribe of Nebraska

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. SUBJECT MATTER JURISDICTION DOES NOT EXIST TO CONSIDER MICHIGAN'S BROAD ATTACKS ON TRIBAL IMMUNITY 4

A. Congress Has Defined The Scope Of Tribal Immunity In This Case 4

B. IGRA's Specific Grant Of Jurisdiction In Section 2710(d)(7)(A)(ii) Displaces General Federal Question Jurisdiction 5

C. IGRA's Detailed Remedial And Enforcement Scheme Confirms The Proper Jurisdictional Path In This Case 10

II. THE CALLS TO EVISCERATE TRIBAL SOVEREIGN IMMUNITY ARE UNFOUNDED AND COULD DO SIGNIFICANT HARM 14

A. IGRA's Carefully Tailored Abrogation Of Tribal Immunity Precludes The Creation Of Additional Non-Textual Remedies 14

B. Congress's Consideration Of Tribal Immunity In The Wake Of *Kiowa* Likewise Counsels Against A Broad Re-Examination Of The Doctrine 17

TABLE OF CONTENTS—Continued

Page

C. Congress Has Wisely Chosen Not To Curtail Tribal Sovereign Immunity In the Ways Suggested By Michigan And Its *Amici* 21

1. No sound basis exists to confine sovereign immunity to "on-reservation" functions 21

2. No sound basis exists to confine sovereign immunity to "governmental" as opposed to "commercial" functions 28

3. No sound basis exists to give Alabama the hammer it seeks to bludgeon tribal governments 30

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Page(s)

Agua Caliente Band v. Superior Court, 10 Cal. Rptr. 3d 679 (Cal. Ct. App. 2004) 32

Alabama v. United States, 630 F. Supp. 2d 1320 (S.D. Ala. 2008) 16

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998) 26

Alden v. Maine, 527 U.S. 706 (1999) 15

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) 32

Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (9th Cir. 1997) 6

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 28, 29, 31

Choteau v. Burnet, 283 U.S. 691 (1931) 30

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) 28

Colorado River Indian Tribes v. NIGC, 466 F.3d 134 (D.C. Cir. 2006) 12

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 30

Diamond Game Enterprises Inc. v. Reno, 230 F.3d 365 (D.C. Cir. 2000) 31

EC Term of Years Trust v. United States, 550 U.S. 429 (2007) 2, 7

TABLE OF AUTHORITIES—Continued

Page(s)

Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002) 22, 30

Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010) 9, 10

FTC v. Payday Financial LLC, 2013 WL 5442387 (D.S.D. Sept. 30, 2013) 31

Hinck v. United States, 550 U.S. 501 (2007) 2, 7

In re BankAmerica Corp. Securities Litigation, 263 F.3d 795 (8th Cir. 2001) 8

Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) 15

John v. Baker, 982 P.2d 738 (Alaska 1999) 26

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) 32

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) ..... *passim*

Lytle v. Griffith, 240 F.3d 404 (4th Cir. 2001) 8

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 30

Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991) 30

Poarch Band of Creek Indians v. State of Alabama, 776 F. Supp. 550 (S.D. Ala. 1991) 32

TABLE OF AUTHORITIES—Continued

Page(s)

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Runyon v. Ass'n of Village Council Presidents, 84 P.3d 437 (Alaska 2004) 26

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) ..... *passim*

Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994) 16

Smith v. Vulcan Iron Works, 165 U.S. 518 (1897) 9

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 10

Swint v. Chambers County Commission, 514 U.S. 35 (1995) 8, 9

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 9

United States v. Dion, 476 U.S. 734 (1986) 15

United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979) 23

United States v. Michigan, 653 F.2d 277 (6th Cir. 1981) 23

United States v. Stanley, 483 U.S. 669 (1987) 8

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506 (1940) 28

Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002) 9, 10

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) 30

STATUTES AND REGULATIONS

15 U.S.C. §§ 1175-1177 17

18 U.S.C.
§ 1166 17
§ 1955 17

25 U.S.C.
§ 81 19
§ 450f (note) 20
§ 450n 20
§ 1151 26
§ 2701(4) 29
§ 2702(1) 29
§ 2710(b)(1)(B) 11
§ 2710(d)(3)(C)(v) 6, 14
§ 2710(d)(7)(A)(ii) ..... *passim*
§ 2710(d)(7)(B)(i) 8
§ 2710(e) 11
§ 2711-2714 14
§ 2713(b) 3, 12
§ 2713(c) 3, 12
§ 2714 ..... 3, 12

26 U.S.C. § 6404(h)(1) 7

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C.
§ 1292(b) 8
§ 1331 6

43 U.S.C.
§§ 1601-1629h 26
§ 1618(a) 26

47 U.S.C. § 252(e)(6) 9

7 Stat. 491 (1836) 23

Siletz Tribal Code § 3.200 20

25 C.F.R. Part 559 13

LEGISLATIVE MATERIALS

S. Rep. No. 106-150 (1999) 20

S. 2299, 105th Cong. (1998) 19

S. 2302, 105th Cong. (1998) 19

144 Cong. Rec. S5218-01 (daily ed. May 20, 1998) 19

OTHER AUTHORITIES

2000 Consent Decree, http://www.michigan.gov/dnr/0,4570,7-153-10364_36925-177786--,00.html) 23

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78 Fed. Reg. 26,384-02 (May 6, 2013) 26

Bay Mills Tax Agreement 33

TABLE OF AUTHORITIES—Continued

Page(s)

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INTEREST OF *AMICI CURIAE*

Amici Curiae are leading national and regional Indian organizations and 51 recognized Tribes from throughout Indian country.[1] The National Congress of American Indians is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native Villages, and is devoted to protecting and enhancing tribal sovereignty. The National Indian Gaming Association includes 184 Indian Nations as members. Its mission is to protect the sovereign interests of Tribes striving for economic self-sufficiency through gaming. The Council of Athabascan Tribal Governments is a consortium of Alaska Native Villages that promotes tribal self-governance. The Affiliated Tribes of Northwest Indians represents 57 tribal governments from Oregon, Washington, Idaho, California, Alaska, and Montana, and is dedicated to promoting tribal sovereignty and self-determination. *Amici* organizations and Tribes have a strong interest in opposing the abandonment of time-honored principles of Indian law and the drastic curtailment of tribal sovereign immunity advocated for in this matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a remarkable case. Michigan and its *amici* urge this Court to revisit the fundamental contours of tribal sovereign immunity. They feel justified in doing so because of an imperfect storm in which various decisions by the parties and the federal government have

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[1] No counsel for any party authored this brief in whole or part. No one other than *amici curiae* made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to the filing of the brief, and letters of consent have been filed with the Clerk.

seemingly put the doctrine at issue. The State and the Bay Mills Indian Community ("Bay Mills") have interposed sovereign immunity defenses in suits that each has brought against the other, thereby preventing resolution of the merits of Bay Mills' claim that its Vanderbilt facility is on Indian lands. Meanwhile, the National Indian Gaming Commission ("NIGC") has concluded that the site does not so qualify, but has misapprehended the Indian Gaming Regulatory Act ("IGRA") as denying it enforcement authority.

Against the pressure to reconsider tribal immunity root and branch stand the principles of judicial caution firmly adhered to by this Court on matters of jurisdiction and remedy. At issue here is whether section 2710(d)(7)(A)(ii) of IGRA applies under the present facts to abrogate Bay Mills' sovereign immunity. If so, the case presumably will proceed to judgment. If not, then subject matter jurisdiction does not exist to proceed further.

Section 2710(d)(7)(A)(ii) is a carefully delineated jurisdictional provision. With its precise identification of claimants, forum, and remedies, it displaces general federal question jurisdiction over the State's causes of action. *See, e.g.*, *Hinck v. United States*, 550 U.S. 501, 506 (2007); *EC Term of Years Trust v. United States*, 550 U.S. 429, 433-34 (2007). The cases cited by the parties in support of section 1331 jurisdiction are not to the contrary, and the balance of the statutory scheme, which would provide for judicial review even on the court of appeals' narrow construction of section 2710(d)(7)(A)(ii), confirms the displacement.

The Vanderbilt facility has been shuttered since the district court issued its injunction. Under NIGC regulations, Bay Mills would have to issue a new facili-

ty license and submit it to the NIGC before the facility could re-open. At that point, the NIGC would have ample tools against an operation that it and the Interior Department have deemed illegal. IGRA allows for tribal gaming only pursuant to NIGC-approved ordinances, and consistent with IGRA's terms, those ordinances (as in the case of Bay Mills') can provide for gaming only on Indian lands. Congress has expressly authorized the NIGC to bring enforcement actions for ordinance violations, including ordering the closure of facilities regardless of their location. 25 U.S.C. § 2713(b). When previously confronted with a Vanderbilt facility that, under its interpretation of "Indian lands," constituted a significant ordinance violation, the NIGC overlooked this enforcement authority. Armed with a proper construction of the statute by this Court, it presumably would not make that mistake again. Bay Mills could then seek judicial review of resulting NIGC enforcement under 25 U.S.C. §§ 2713(c) and 2714 and the APA. The State could seek to intervene. And the merits of Bay Mills' position would be fully addressed. Section 1331 jurisdiction does not exist under these circumstances.

Even if this Court disagrees, two additional, insuperable obstacles (again grounded in principles of judicial caution) defeat any suggestion that this Court perform radical surgery on the immunity doctrine. Such an exercise would directly contradict this Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-74 (1996), that IGRA's "carefully crafted and intricate remedial scheme" precludes additional, judicially fashioned inroads into immunity. It would also fly in the face of the deference to Congress that informed *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). In the wake of *Kiowa*,

Congress deliberated carefully about the wisdom of maintaining the tribal immunity doctrine, choosing ultimately to place certain limits on it while rejecting the drastic curtailments proposed here. And Congress had sound reason for acting as it did, for each of the suggested modifications would invite endless line-drawing and engender drastic policy consequences. As frustrating as the course here has been, it provides no warrant for this Court to abandon its considered approach to issues of jurisdiction and remedy.

ARGUMENT

I. SUBJECT MATTER JURISDICTION DOES NOT EXIST TO CONSIDER MICHIGAN'S BROAD ATTACKS ON TRIBAL IMMUNITY.

A. Congress Has Defined The Scope Of Tribal Immunity In This Case.

IGRA provides a comprehensive statutory framework for "the operation and regulation of gaming by Indian tribes." *Seminole Tribe*, 517 U.S. at 48. In doing so, it vests the district courts with "jurisdiction over ... any cause of action initiated by a State ... to enjoin class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). This case concerns the scope of that provision.

The court of appeals held that the provision does not reach Michigan's claims because the State "expressly allege[s] that the Vanderbilt casino is not located on Indian lands." Petition for Certiorari Appendix ("Pet. App.") 7a. The court construed the statute to apply only to gaming in fact taking place on such lands, and hence concluded that the State's "own pleadings defeat [its] argument." *Id.* If this Court agrees, then

the legality of the Vanderbilt facility can be tested through other review and enforcement mechanisms under IGRA, as discussed in Part IC. below.

Alternatively, as the court of appeals recognized, Bay Mills alleges that it can game at Vanderbilt precisely because that operation "*is* located on 'Indian lands.'" Pet. App. 9a. This Court might construe IGRA's abrogation provision to permit suit where the lawfulness of the challenged activity turns on the validity of the operating Tribe's claim that the gaming site is "Indian lands." On that construction, this suit would proceed.

Either way, the statutory determination should resolve the dispute before the Court. The State and its *amici* ask the Court to go further, reconsidering tribal immunity itself. But there is no basis—either jurisdictional or substantive—for such reconsideration in a case that turns on what Congress intended when it enacted a statutory provision: (1) vesting jurisdiction in the district courts over certain claims; (2) abrogating an immunity that Congress plainly understood to otherwise exist; and (3) establishing a detailed remedial scheme that, properly administered, amply addresses other situations. Where Congress has carefully framed such an integrated scheme and expressly exercised its prerogative to limit tribal immunity in some, but only some, circumstances, the sole question for the courts is whether that limitation applies to particular facts.

B. IGRA's Specific Grant Of Jurisdiction In Section 2710(d)(7)(A)(ii) Displaces General Federal Question Jurisdiction.

Michigan offers scant argument that this case falls within section 2710(d)(7)(A)(ii), *see* Brief for Petitioner ("Pet. Br.") 20-22, the jurisdictional basis that the court of appeals rejected for the first three counts of the

State's original and amended complaints (alleging IGRA and compact violations). Instead, it moves quickly to asserting that jurisdiction exists under the general grant of 28 U.S.C. § 1331. Michigan pled this basis for the fourth through sixth counts of its amended complaint, purporting to raise federal common law and state law causes of action. *See id.* at 22-25. The State then argues that a "holistic" interpretation of IGRA demonstrates Congress's intent to abrogate Bay Mills' immunity, *see, e.g., id.* at 25-33, and alternatively that the Court should revisit the principle of tribal immunity if that is what is required for the State's suit to proceed, *id.* at 36-41. If, however, this Court construes section 2710(d)(7)(A)(ii) contrary to the State's interpretation, it should end its analysis there, as subject matter jurisdiction does not lie to proceed further. That result would not deny the State recourse were Bay Mills to re-open its Vanderbilt facility; the statutory scheme provides for agency and then judicial review in that circumstance.

Section 2710(d)(7)(A) provides that the federal district courts "shall have jurisdiction over" three categories of claims, including potentially the type presently at issue. IGRA additionally provides that tribal gaming compacts may include "remedies for breach of contract," 25 U.S.C. § 2710(d)(3)(C)(v), and a State and Tribe accordingly may negotiate for a waiver of immunity and the right to bring suit in federal court over which federal question jurisdiction would lie.[2] But the

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[2] Given the "express authorization of a compact to provide remedies for breach of contract," and given that "the Compacts quite clearly are a creation of federal law," such negotiated provisions supply a jurisdictionally cognizable federal claim. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).

parties did not negotiate such a provision here (they negotiated for other remedies instead). And the State's purported federal common law and state law causes of action—turning on whether the Vanderbilt site qualifies as Indian lands—attempt to raise issues squarely within the domain of section 2710(d)(7)(A)(ii) while eliding that provision's "on Indian lands" requirement. This the State could not do.

Under the "well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies," *Hinck*, 550 U.S. at 506 (internal quotation marks omitted), a statute establishing jurisdiction over claims in specified circumstances precludes reliance on broader sources of law to supply jurisdiction absent those conditions. Hence, in *Hinck*, the Court held that 26 U.S.C. § 6404(h)(1), which expressly provided for review of interest abatement claims in the Tax Court, was the taxpayer's exclusive route to relief for such a claim, even though the statute did not specify that its terms, and hence jurisdiction in the Tax Court, were exclusive. 550 U.S. at 506. Because it was "a precisely drawn, detailed statute that, in a single sentence, provide[d] a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief," *id.* (internal quotation marks omitted), those restrictions controlled and displaced the broader jurisdiction-granting provisions relied on by the plaintiffs. *See also EC Term of Years Trust*, 550 U.S. at 434 (plaintiff could not "avail [itself] of the general tax-refund jurisdiction of [28 U.S.C.] §1346(a)(1)" in district or federal claims court where Congress tailored a separate provision for jurisdiction (in the same courts) over third-party claims of wrongful levy).

Section 2710(d)(7)(A) similarly provides—and also in a single sentence—for jurisdiction over three categories of claims. It specifies the forum for adjudication (federal district court) and the potential plaintiffs (States, Tribes, and/or the Secretary of the Interior) and authorizes judicial relief (including, under subpart (ii), injunctive relief). Neighboring provisions specify certain statutes of limitations. 25 U.S.C. § 2710(d)(7)(B)(i). The State, understandably, invoked subpart (ii) in challenging the legality of the Vanderbilt site. But it could not, in light of that provision, also posit jurisdiction under section 1331 for purported federal common and state law claims centering on the same issue.[3]

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[3] If Michigan argues that its amended and original claims are jurisdictionally distinct, a serious question of interlocutory jurisdiction would arise. When the Little Traverse Bay Bands of Odawa Indians sought the preliminary injunction underlying these proceedings, it and the State had "nearly identical," District Court Order (Pet. App. 20a), original complaints on record. Those complaints pled three causes of action, all premised solely on section 2710(d)(7)(A)(ii). The State filed its Amended Complaint on August 9, 2011, four months after the district court entered the injunction at issue here and a notice of appeal had been filed. Civil Docket for Case #: 1:10-cv-01273-PLM Nos. 33, 39, 74. Thus, the State's amended claims were not before the district court at the time it issued the injunction and were not addressed in that order or any other order of the district court.

In discussing interlocutory jurisdiction under 28 U.S.C. § 1292(b), this Court has explained that "because the statute brings [an] 'order' ... before the court ... jurisdiction is confined to the particular order appealed from." *United States v. Stanley*, 483 U.S. 669, 677 (1987) (emphasis omitted). The Court has applied *Stanley* to other interlocutory review, *see Swint v. Chambers County Comm'n*, 514 U.S. 35, 49 (1995), and its holding applies squarely to section 1292(a)(1), which also brings injunctive "orders" before the appellate courts. *See In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 804 (8th Cir. 2001); *Lytle v. Griffith*, 240 F.3d 404, 411 n.5 (4th Cir. 2001).

The State cites *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010), for the proposition that unless statutory text expressly limits section 1331 jurisdiction, plaintiffs may invoke that provision. Pet. Br. 23. *Free Enterprise Fund* does not say this. Instead, it carefully considered whether the statute at issue expressly or "implicitly" displaced such jurisdiction. 130 S. Ct. at 3150. And, as discussed below, the factors the Court found to weigh against a holding of displacement call for the opposite conclusion here.

Bay Mills correctly frames the question as whether anything "in IGRA demonstrates an intent to withdraw subject matter jurisdiction that otherwise exists under section[] 1331," Brief for Respondent ("Resp. Br.") 24, but then simply cites *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 643-44 (2002). In *Verizon*, the Court held that 47 U.S.C. § 252(e)(6), which enables review of certain telecommunications determinations made by state utilities, does not implicitly displace section 1331 jurisdiction with respect to the review of other actions by those utilities. The Court emphasized several features of section 252(e)(6) that contrast starkly with section 2710(d)(7)(A)(ii). Most significantly, the former "does

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Review may extend to "rulings ... inextricably intertwined" with an interlocutory order, *Swint*, 514 U.S. at 51, including dispositive legal issues on which an injunction is predicated. *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986) (*overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)); *Smith v. Vulcan Iron Works*, 165 U.S. 518, 524-25 (1897). If the State's original and amended claims are distinct enough to permit invocation of section 1331 jurisdiction over the latter, the same analysis would suggest the claims not to be inextricably intertwined, and interlocutory jurisdiction hence to be lacking over the amended claims.

not even mention subject-matter jurisdiction, but reads like the conferral of a private right of action," *id.* at 644, which is of course a central distinction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). In addition, while section 252(e)(6) "does not distinctively limit the substantive relief available," 535 U.S. at 644, section 2710(d)(7)(A)(ii) jurisdiction is confined to the granting of injunctive relief. Finally, while the Court found that "none of the other provisions of the Act evince any intent to preclude federal review of a commission determination," *id.*, the same cannot be said of IGRA. It is to that issue that this brief turns next.

C. IGRA's Detailed Remedial And Enforcement Scheme Confirms The Proper Jurisdictional Path In This Case.

In *Free Enterprise Fund*, this Court held that section 78y of the Sarbanes-Oxley Act, providing for judicial review of certain actions by the SEC, did not preclude section 1331 jurisdiction over constitutional challenges to the Public Company Accounting Oversight Board, established by the Act under the SEC's oversight. The Court found that such challenges could not be meaningfully pursued under section 78y, because the provision allowed for judicial review of SEC rather than Board action, and because the constitutional claims fell "outside the Commission's competence and expertise." 130 S. Ct. at 3151.

The present situation is different, for even if this Court adopts a restrictive view of section 2710(d)(7)(A)(ii), judicial review of the Bay Mills facility would still obtain under IGRA's scheme. IGRA establishes as a critical prerequisite to tribal gaming the adoption (and federal approval) of a gaming ordinance. Section 2710(d)(2)(A) provides that

> [i]f any Indian tribe proposes to engage in ... a class III gaming activity on Indian lands ... the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

Under subsection (b), an approved ordinance must mandate "[a] separate license issued by the Indian tribe ... for each ... [facility] on Indian lands at which ... gaming is conducted." 25 U.S.C. § 2710(b)(1)(B). And 25 U.S.C. § 2710(e) requires the NIGC Chairman to "approve [a submitted ordinance] if it meets the requirements of this section." Thus, every IGRA gaming facility must be licensed by a tribe under a federally approved tribal gaming ordinance.

Bay Mills submitted an amended gaming ordinance for NIGC approval on August 2, 2010, Pet. App. 103a, describing a Bay Mills Gaming Commission responsible for issuing the required facilities licenses. Ordinance §§ 4 and 5 (Pet. App. 118a-146a). The ordinance provides that the Commission shall issue a facility license only where "[t]he proposed gaming activity is to be located on 'Indian lands,' as defined in Section 2.30 of this Ordinance [tracking the IGRA definition]." *Id.* § 5.5(A).

The NIGC Chairwoman approved the ordinance on September 15, 2010. Pet. App. 101a. In doing so, she underscored that "[i]t is important to note that approval is granted only for gaming on Indian lands as defined by IGRA over which the Community has jurisdiction." *Id.* The tribal Commission then issued a license for the Vanderbilt facility on October 29, 2010. *See* Class III Facility Gaming License, Doc. 1278 No. 22 Ex. K. On November 9, 2010, the NIGC requested a legal opinion from the Solicitor of the Interior regarding the Indian

land status of the facility, and on December 21, 2010, the Solicitor concluded in a detailed analysis that it was not on Indian lands. Joint Appendix 69-101. In a letter of the same day, the NIGC concurred but declined to take enforcement action, asserting that because the facility was not on Indian lands, it could not pursue the matter further. *Id.* at 102.

But this was not so. Section 2713 authorizes the Commission to "order a permanent closure of [a] gaming operation" (without reference to its location), and to take other enforcement action "for substantial violation of the provisions of this chapter ... or of tribal ... ordinances or resolutions approved under section 2710." 25 U.S.C. § 2713(b). Such an order is subject to federal court review. *Id.* §§ 2713(c) and 2714.

Accordingly, once the NIGC concluded that Bay Mills was operating the Vanderbilt facility outside of Indian lands in contravention of its NIGC-approved gaming ordinance, the agency had the power to take enforcement action. In construing its authority otherwise, the NIGC undermined the statutory scheme. Tribes have frequently challenged the Commission for overstepping its regulatory bounds. *See, e.g., Colo. River Indian Tribes v. NIGC*, 466 F.3d 134 (D.C. Cir. 2006).[4] It is, however, fundamentally inconsistent with the structure and purposes of IGRA for the Commission to disclaim the authority Congress gave it to enforce the terms of a tribal gaming ordinance when a

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[4] The State *amici's* argument that the Commission is derelict in monitoring Indian gaming, issuing only ten closure orders in twenty-five years, is highly misleading. In that same period, the Commission entered 117 settlements with tribes, often containing stringent conditions, and issued numerous notices of violation and fines. *See* http://www.nigc.gov/Reading_Room/Enforcement_Actions.aspx.

tribe has opened a gaming facility that it claims complies with IGRA, but that the Commission has concluded is not on Indian lands. That abdication of express regulatory authority disserves both state and tribal interests.

Had the NIGC exercised its statutory authority, Bay Mills could have sought judicial review, the State could have intervened, and the parties could have litigated Bay Mills' MILCSA theory with the benefit of the Interior and NIGC assessments of that theory, and without wading into fundamental issues of tribal immunity. This remains the proper and available course.

The Bay Mills facility has been shuttered since the district court issued its preliminary injunction. *See* Resp. Br. 17. Under NIGC regulations, 25 C.F.R. Part 559, Bay Mills cannot re-open that facility without issuing a new license and so notifying the Commission. The NIGC could then take enforcement action, from which judicial review would lie. No jurisdictional basis exists in the meantime for the far-reaching re-examination of tribal immunity urged by Michigan and its *amici*.

Seminole Tribe held that the "carefully crafted and intricate remedial scheme set forth in §2710(d)(7)," 517 U.S. at 73-74, precluded judicial supplementation of that scheme through the imposition of an *Ex Parte Young* cause of action. *Id.* at 74. Likewise, no warrant exists for the supplementation of the detailed jurisdictional scheme of section 2710. This Court can return this dispute to its proper path by clarifying that, should Bay Mills re-open the Vanderbilt facility, the NIGC will have enforcement authority from which judicial review will lie.

II. The Calls To Eviscerate Tribal Sovereign Immunity Are Unfounded And Could Do Significant Harm.

A. IGRA's Carefully Tailored Abrogation Of Tribal Immunity Precludes The Creation Of Additional Non-Textual Remedies.

Even if this Court disagrees with this jurisdictional map, it should decline to embark on a free-form reassessment of tribal immunity. Two decisions of this Court counsel squarely—for independent and sufficient reasons—against such a reassessment. The first is *Seminole Tribe*.

As noted, the Court there held that the "carefully crafted and intricate remedial scheme set forth in §2710(d)(7)," 517 U.S. at 73-74, precluded judicial establishment of an *Ex Parte Young* cause of action against State officers for refusing to engage in good faith compact negotiations. *Id.* at 74. Because Congress had thoroughly considered the extent to which it wished to abrogate state immunity, and had forged a specific path to effect that abrogation, the Court declined to widen or lengthen the path, even though it deemed much of it off-limits under the Eleventh Amendment. *Id.* at 74-76.

This reasoning fully applies to the suggestions to curtail tribal immunity. IGRA partially abrogates tribal immunity and provides for remedies against tribes through several mechanisms: the abrogation clauses of section 2710(d)(7)(A)(ii) and (iii), NIGC enforcement in sections 2711-2714, and section 2710(d)(3)(C)(v)'s authorization of negotiated remedies. Congress's delineation of specific avenues of recourse against tribes counsels heavily against "casting aside those limitations," 517 U.S. at 74, in favor of the unbounded abrogation of tribal immunity now urged upon this Court.

Michigan and its *amici* ignore the statutory framework in which this case arises and the Court's interpretation of it. But this Court does not take doctrinal approaches only for certain classes of litigants. The Court's reluctance to craft additional inroads into sovereign immunity where Congress carefully mapped the extent of those inroads applies as squarely to tribal immunity under IGRA as it does to state immunity, and the arguments of Michigan and its *amici* founder for their failure to so recognize.[5]

The incongruity of those arguments is particularly stark given the extent to which the states have benefited from *Seminole Tribe*. This Court's dual holdings that Congress could not authorize Tribes to sue States directly for failure to engage in compact negotiations, and that an *Ex Parte Young* cause of action is unavailable against responsible state officers, have left many Tribes unable to secure the gaming compacts contem-

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[5] Michigan and its *amici* suggest that tribal immunity is less deserving of protection than state immunity because the former derives from the common law, while the latter is of constitutional dimension. *See, e.g.*, Pet. Br. 30-31. This argument misapprehends the nature of state immunity. *See Alden v. Maine*, 527 U.S. 706, 712-13 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, ... the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."). It also stands basic principles of federal Indian law on their head. This Court has long stated that the combination of Congress's trust responsibility towards tribes and its expansive power to abrogate tribal rights imposes on Congress the obligation to make manifest any intention to engage in such abrogation. *See, e.g, Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987); *United States v. Dion*, 476 U.S. 734, 739-40 (1986). Congress's considered, limited abrogation of both state and tribal immunity in IGRA defeats any argument that it countenanced the wholesale evisceration of the latter.

plated by IGRA, or able to do so only by ceding to states significant portions of their gaming revenues. *See, e.g., Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1026 n.8 (9th Cir. 2010) (discussing the "prevalence of compacts containing revenue sharing provisions" in the wake of *Seminole Tribe*). Alabama itself was a party to the lower court proceedings in *Seminole Tribe*, *see, e.g.*, 11 F.3d 1016, 1020-21 (11th Cir. 1994), and since then has steadfastly refused to negotiate a compact with the one recognized tribe within its borders. *See, e.g., Alabama v. United States*, 630 F. Supp. 2d 1320, 1323-25 (S.D. Ala. 2008). Alabama nowhere suggests that this Court revisit *Seminole Tribe*, and the evident inconsistency in its position may partially explain why a distinct majority of States (including those with significant Indian country) declined to join Alabama's or any other *amicus* effort in support of Michigan's position.

Should this Court adhere to the approach taken in *Seminole Tribe*, Michigan would have ample recourse regarding the Vanderbilt facility. In addition to the agency enforcement and judicial review detailed above, Michigan could withdraw its assertion of immunity in the declaratory judgment action brought by Bay Mills against its Governor (with such safeguards as it sees fit; the same could be suggested of Bay Mills in the State's action). *Bay Mills Indian Community v. Snyder*, Civ. Dock. No. 1:11-cv-00729-PLM (W.D. Mich. 2011). Moreover, the Bay Mills compact is being renegotiated and, as many of its counterparts have done, the State could negotiate for effective remedies as part of that process. *See* Brief for *Amicus* Seminole Tribe, et al. 13-24.

The United States, moreover, has significant authority in addition to that discussed above to prevent

unlawful tribal gaming within and outside of Indian Country. *See, e.g.*, 15 U.S.C. §§ 1175-77 (prohibiting unlawful gaming devices in Indian Country); 18 U.S.C. § 1166 (authorizing federal enforcement against unlawful gaming within Indian Country); 18 U.S.C. § 1955 (authorizing federal enforcement of state gambling laws within state's jurisdiction). Federal prosecutors bring many tools to bear in such situations and, as a condition of non-prosecution, could require Bay Mills to cease operations, admit fault, and pay restitution or civil fines.

In sum, no reason exists to depart from *Seminole Tribe*. Congress's considered attention in IGRA to a limited abrogation of tribal immunity, and to the mechanisms for effectuating that abrogation, precludes sweeping revisions to the doctrine here.

B. Congress's Consideration Of Tribal Immunity In The Wake Of *Kiowa* Likewise Counsels Against A Broad Re-Examination Of The Doctrine.

Even if this Court were to entertain the calls to re-examine tribal immunity without regard to the statutory context in which this case arises, those calls would run headlong into *Kiowa*. The *Kiowa* Court questioned "the wisdom of perpetuating the [immunity] doctrine," 523 U.S. at 758, but ultimately rejected invitations to judicially "confine [immunity] to reservations or to non-commercial activities" for asserted policy reasons. *Id.* Congress, the Court explained, has legislated against a settled background rule of tribal immunity. It "has restricted tribal immunity from suit in limited circumstances," and "in other statutes it has declared an intention not to alter it." *Id.* (collecting examples). And Congress is "position[ed] to weigh and accommodate

the competing policy concerns and reliance interests" implicated by any alteration of immunity. *Id.* at 759. Accordingly, the Court "defer[red] to the role Congress may wish to exercise in this important judgment." *Id.* at 758.

Michigan and its *amici* barely acknowledge this holding, arguing instead that, after *Kiowa*, Congress simply failed to reconsider tribal immunity, so that the Court should play this role. In truth, Congress actively re-examined tribal sovereign immunity while *Kiowa* was pending and continued to do so with greater intensity after the opinion issued. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law*, 37 Tulsa L. Rev. 661, 729 n.320, 729-51 (Spring 2002).

Senator Slade Gorton introduced several bills in the years immediately preceding *Kiowa* proposing to broadly eviscerate tribal immunity. *See id.* at 726-27. Congress heard testimony on the bills from witnesses opposing and supporting tribal immunity, *see id.* at 729-42, including those of the view that such immunity had outlived its usefulness in light of tribal economic development, *id.* at 733.

Senator Ben Nighthorse Campbell responded with far more limited measures addressing tribal immunity. *See id.* at 727-29. Senator Campbell did

> not agree with those who suggest that the doctrine of tribal sovereign immunity is an anachronism .... I call on the quiet, thoughtful, and reasonable people on both sides of these issues to craft solutions that respect[] Indian tribal governments and yet provide[] reasonable solutions for legitimate problems that do exist.

144 Cong. Rec. S5218-01 (daily ed. May 20, 1998) (Statement of Sen. Campbell).

On the heels of *Kiowa*, Senator Gorton introduced two additional bills, the "Findings" sections of which directly invoked this Court's observation that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Kiowa*, 523 U.S. at 758. With this statement as their premise, Senator Gorton's bills proposed to broadly abrogate tribal sovereign immunity in the contract and tort contexts. *See* S. 2299 and S. 2302, 105th Cong. (1998).

Thus, in the wake of *Kiowa*, Congress had before it approaches to tribal immunity ranging from targeted reform to wholesale abrogation, and accepted the Court's invitation to "weigh and accommodate the competing policy concerns and reliance interests." 523 U.S. at 759. It chose to adopt Senator Campbell's more limited approach to abrogation in enacting the Indian Tribal Economic Development and Contracts Encouragement Act of 2000.[6] The Act addressed directly this Court's concerns that "immunity can harm those who ... do not know of tribal immunity," *Kiowa*, 523 U.S. at 758, by mandating that contracts with Indian tribes requiring federal approval include provisions either disclosing or waiving immunity, and forbidding federal approval otherwise. 25 U.S.C. § 81(d)(2). The Senate report accompanying the legislation notes that over the course of "extensive hearings," Congress had considered "divergent views about the value, effect,

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[6] Pub. L. No. 106-179, 114 Stat. 46 (2000) (codified at 25 U.S.C. § 81).

and even the purpose and justification for the [immunity] doctrine." S. Rep. No. 106-150, at 11-12 (1999).

In the torts context, Congress again rejected Senator Gorton's sweeping proposals, choosing instead to amend the Indian Self-Determination and Education Assistance Act of 1975 to direct the Secretary of the Interior to produce legislative recommendations. *See* 25 U.S.C. § 450f (note).[7] Notably, Congress left undisturbed that Act's express preservation of tribal immunity, 25 U.S.C. § 450n, which had been cited in *Kiowa* as an example of Congress's affirmation of the doctrine. 523 U.S. at 758.[8]

In sum, the suggestion that this Court must act with respect to tribal immunity because Congress "has failed" to do so, Pet. Br. 39, is without basis. *Kiowa*'s

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[7] Pub. L. No. 105-277, § 101(e), 112 Stat. 2681-335 to 2681-337 (1998) (codified at 25 U.S.C. § 450f (note) (2000)).

[8] Congress's caution in the torts context was a reasoned approach considering ongoing development at the state and tribal levels. States and tribes have negotiated compact provisions addressing immunity and tort claims. *See, e.g.*, July 6, 2010 Compact, Seminole Tribe of Florida—State of Florida, Part VI(D) (providing for tort claims "against the Tribe in any court of competent jurisdiction ... [and waiving] tribal sovereign immunity to the same extent as the State [waiver]"); June 26, 1995 Compact, Prairie Band Potawatomi Nation in Kansas—State of Kansas, § 3(D) and (E) ("Tort claims ... shall be subject to disposition as if the Tribe was the State, pursuant to the Kansas Tort Claims Act ... which is hereby adopted by the Tribe in its entirety."). Cited compacts available at http://www.nigc.gov/Reading_Room/Compacts.aspx. In addition, numerous tribes have, as responsible governments, enacted codes providing for limited waivers of immunity to compensate tort victims without bankrupting the public fisc. *See, e.g.*, March 18, 2000, Siletz Tribal Code § 3.200, *available at* http://www.ctsi.nsn.us/uploads/downloads/TribalOrdinances/3-200_Torts_and_Indian_Civil_Rights_Act.pdf.

holding of deference to Congress was presumably not a veiled command to upend the immunity doctrine. This Court rightly left to Congress the appropriate contours of the doctrine, and Congress has deliberated and legislated accordingly. If Michigan and its *amici* do not like the results, their recourse is with Congress alone.

Adherence to *Kiowa* is particularly appropriate here. *Kiowa* cites section 2710(d)(7)(A)(ii) as an example of Congress, legislating against the background principle of immunity, deciding to effect a limited abrogation. 523 U.S. at 758. Where Congress has so acted, the proper question for the courts is not whether Congress's judgment should be ignored, as urged by Michigan and its *amici*, but rather how to apply that judgment to the facts of this case.

C. Congress Has Wisely Chosen Not To Curtail Tribal Sovereign Immunity In the Ways Suggested By Michigan And Its *Amici*.

Michigan and its *amici* advance several ways to curtail tribal immunity. These approaches run directly counter to this Court's precedents, they would invite endless litigation over elusive distinctions, and are unsound as public policy. Congress has wisely rejected them.

1. No sound basis exists to confine sovereign immunity to "on-reservation" functions.

Michigan and Oklahoma suggest restricting immunity to a tribe's "governmental, on-reservation functions." Pet. Br. 39. This would require retreating not only from *Kiowa* but also from *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977), which upheld immunity with respect to a tribe's fishing activities "both on and off its reservation." *Id.* at 167;

see also Kiowa, 523 U.S. at 754 (stating that "[t]o date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred," and discussing *Puyallup*).[9]

Such a restriction would also engender endless litigation over whether a tribe's challenged activities were sufficiently "off-reservation" to justify withdrawal of immunity. This controversy is a case in point, given Michigan's argument that while the Vanderbilt facility is outside of Bay Mills' Indian country, Bay Mills' authorization of the facility occurred at the tribe's reservation. Pet. Br. 21. How a court is supposed to apply an Indian country-based distinction in such a situation is nowhere made clear. But sovereign immunity "does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit." *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002). A proposed distinction that would invite endless controversy offends the principle that immunity protects governments from the burdens and embarrassment of litigation. *Id.* at 765.

The distinction is also unsound as a matter of policy. Tribes engage in a wide variety of cooperative, sovereign endeavors outside of their Indian country. Federal law specifically recognizes their authority to do so, including with respect to federally protected resource rights. To safeguard such rights, tribes undertake regulatory, conservation and law enforcement activities well beyond their borders, frequently coordinating with federal and state governments. Such is the

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[9] Thus, Michigan's suggestion that Congress could not have known that tribal immunity extended off-reservation at the time of IGRA, Pet. Br. 25-28, is misplaced.

case in Michigan, and the fact that the Michigan tribes' immunity extends beyond their territories has helped make this beneficial cooperation possible.[10]

The Michigan Tribes (including Bay Mills) party to the 1836 Treaty of Washington, 7 Stat. 491 (1836), enjoy fishing, hunting and gathering rights extending to large swaths of ceded land outside of their Indian country, as well as the ceded waters of the Great Lakes and Michigan's inland lakes and streams. *United States v. Michigan*, 471 F. Supp. 192, 212-13 (W.D. Mich. 1979). The State and the Tribes share regulatory jurisdiction over many of the resources, *United States v. Michigan*, 653 F.2d 277, 278-79 (6th Cir. 1981), and have accordingly entered consent decrees governing resource management and conservation.[11] Under these agreements, the treaty Tribes exercise considerable governmental authority beyond their Indian country. For example, through bodies including the Great Lakes Fisheries Commission, the tribes share responsibility with Michigan, Ontario, and the federal government in making fisheries management decisions for ceded waters.[12]

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[10] This discussion focuses on Michigan because of its situs as the genesis of this dispute. The *amici* tribes are engaged in constructive, off-reservation conduct in all different parts of the country, and with respect to many forms of activity going beyond resource rights.

[11] *See, e.g.*, 2000 Consent Decree, http://www.michigan.gov/dnr/0,4570,7-153-10364_36925-177786--,00.html); 2007 Inland Consent Decree, http://www.michigan.gov/dnr/0,1607,7-153-10364_47864---,00.html.

[12] *See* http://www.1836cora.org/Home.php; http://www.glfc.org/boardcomm/cglfa/cglfahome.php; http://www.michigan.gov/documents/dnr/2007-status-report_275666_7.pdf.

These Tribes also participate in substantial resource enhancement activities. In August 2013, for example, Little Traverse opened a fish hatchery and research facility near Pellston, Michigan. State Natural Resources Fisheries Director Jim Dexter has described the facility as "exceptional[,] state of the art" and "a testament to the [Little Traverse] vision of protecting and relocating fish back to important areas."[13] The Grand Traverse Band has likewise partnered with the State and federal government in the "largest dam removal project in Michigan's history."[14] Michigan's Department of Natural Resources has praised this project as "a model for how diverse organizations can collaborate effectively to work through complex issues that span multiple jurisdictional boundaries. The project actively engages local, state, federal and tribal units of government."[15]

The Tribes' off-reservation responsibilities also encompass law enforcement. For example, under a Limited Appointment Agreement, officers of the Little River Band of Ottawa Indians enforce Michigan's hunting and fishing license requirements against both non-Indians and tribal members. Limited Appointment Agreement Between the Michigan Department of State Police and the Little River Band of Ottawa Indians § 2 (January 16, 2009).

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[13] http://articles.petoskeynews.com/2013-08-02/fish-hatchery_41013582.

[14] http://www.theboardman.org/dam-project/; http://www.theboardman.org/participation/.

[15] http://www.michigan.gov/dnr/0,4570,7-153-10366_46403_63473-308057--,00.html.

Without immunity, the treaty Tribes would be chilled in discharging these important responsibilities, to the detriment of Michigan and its citizens as well as the Tribes. The threat of onerous litigation and ruinous liability would hamper joint endeavors to protect off-reservation rights and resources,[16] because stereotypical notions of rich gaming tribes are just that—stereotypes. In truth, "[t]he fragile finances of many tribes ... give [protection of the public fisc] added force in the tribal context. One large judgment [can] threaten a tribe's existence." Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity and the Construction of Tribal Sovereignty*, 51 B.C. L. Rev. 595, 629 (May 2010) (footnotes omitted).[17] This could explain why Michigan is ambivalent regarding the extent to which it thinks tribal immunity should be curtailed for off-reservation activities. *Compare* Pet. Br. 39 (advocating limiting immunity to a tribe's on-reservation functions) *with id.* at 40 (immunity should

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[16] Tribes may, of course, waive immunity in whole or in part as circumstances warrant. Hence, in the Limited Appointment Agreement, Little River "agree[d] to a limited waiver of its immunity," such that the Tribe is liable for its officers' torts to the same extent that the State is liable for its. *Id.*, § 12(a).

[17] In 2011, less than one-fifth of Indian gaming facilities in the United States accounted for more than 70% of Indian gaming revenues. *See* NIGC, Tribal Gaming Revenues, fiscal year 2011, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/GamingRevenues20072011.pdf. By contrast, more than half of such facilities accounted for less than 8% of revenues, and roughly one-third of facilities accounted for less than 2% of all revenues. *Id.* As the majority of tribes are not gaming tribes, the distribution of revenue among all tribes is even more disparate than these numbers suggest, "giving lie to the widely held notion that Indian gaming is making all Indians wealthy." *The State of the Native Nations*, Harvard Project on American Indian Economic Development, 149 (Oxford Univ. Press 2008).

not extend to "commercial conduct occurring on lands under state jurisdiction").

Alaska provides another instructive example. There exist over 200 federally recognized Alaska Native tribes. *See* 78 Fed. Reg. 26,384-02 (May 6, 2013). However, as a result of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629h, and this Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), Alaska Native tribes generally have no Indian country within the meaning of 25 U.S.C. § 1151.[18] *See* Natalie Landreth and Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 Am. Indian L. Rev. 321, 336 (2012).

Until now, these tribes' immunity from suit has been unquestioned. *See Runyon v. Ass'n of Village Council Presidents*, 84 P.3d 437, 439 (Alaska 2004). Limiting the doctrine to Indian country would all but eliminate it for them. And the consequences would be dire. Alaska Native tribes exercise the sovereign "power of regulating [members'] internal and social relations." *John v. Baker*, 982 P.2d 738, 755 (Alaska 1999) (internal quotation marks and citation omitted). In addition, many tribes function as local governments and provide important social services. For example, the Akiachak Native village maintains police and fire departments. Veronica E. Velarde Tiller, *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations* 45 (Bow Arrow Pub. Co. 2005). The

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[18] *Venetie* was careful to note, however, that Indian allotments in Alaska can still qualify as Indian country. *See* 522 U.S. at 527 n.2. And ANCSA spared one reservation from disestablishment. 43 U.S.C. § 1618(a).

unincorporated Native villages of Gulkana and Igiugig own health clinics leased to the United States Public Health Service. *Id.* at 116, 124. Relying on federal aid, Alaska Native tribes provide vital health care, housing and infrastructure; and nearly all tribes contract with the federal government to provide services to their members. *See* http://www.gao.gov/new.items/d05719.pdf; Geoffrey D. Strommer & Stephen D. Osborne, *"Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 Alaska L. Rev. 1, 12 & n.60 (June 2005).

The removal of immunity could preclude the Alaska tribes from fulfilling these functions. For if the notion of a rich gaming tribe is a stereotype in the lower 48 states, it is utter myth in Alaska, where only two remote gaming facilities exist in the entire state.[19]

To restrict tribal sovereign immunity to Indian country, then, would contravene any sensible notion of public policy. Congress has wisely chosen not to travel that path.

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[19] NIGC, *Gaming Tribe Report*, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/listandlocationoftribalgamingops/statecc.pdf. Alaska Natives' economic conditions "fall considerably below averages among other Alaskans and other Americans." Stephanie Martin & Alexandra Hill, *The Changing Economic Status of Alaska Natives, 1970-2007*, Note No. 5, Inst. of Social and Econ. Research, Univ. of Alaska Anchorage, July 2009, at 1, *available at* http://www.iser.uaa.alaska.edu/Publications/webnote/WebNote5.pdf (last visited Oct. 30, 2013). Alaska Native tribes are separate from the Regional Corporations that ANCSA envisioned as engines of economic development, and they have highly limited resources. *See* Tiller, *supra*.

2. No sound basis exists to confine sovereign immunity to "governmental" as opposed to "commercial" functions.

Congress likewise has had compelling reasons to reject the suggestion that tribal immunity be curtailed for "commercial" functions. First, this Court has upheld tribal immunity in a variety of contexts that Michigan and its *amici* might term commercial, *see, e.g.*, *Kiowa*, 523 U.S. at 760 (commercial contracts), *Puyallup*, 433 U.S. at 167 (commercial fishing), and *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (coal-mining lease), and has declined to draw that distinction regarding sovereign immunity more generally. Hence, in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), the Court rejected the argument that state sovereign immunity is "any less robust" for conduct "that is undertaken for profit [and] that is traditionally performed by private citizens and corporations," *id.* at 684. It declared emphatically that "it is hard to say that that limitation has any more support in text or tradition than, say, limiting abrogation or constructive waiver to the last Friday of the month" not because of factors specific to the Eleventh Amendment, but because "sovereign immunity itself was not traditionally limited by these factors." *Id.*

The contention also raises serious problems of line-drawing, as this case again illustrates. Michigan and Oklahoma posit, without discussion, that tribal gaming is "commercial" rather than "governmental," and in doing so ignore the genesis of tribal gaming in the modern era. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), considered whether states had authority over tribal gaming. "The inquiry," the Court stated, "is to proceed in light of traditional notions of

Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* at 216. The Court held that the federal interest in fostering strong tribal governments, as expressed in President Reagan's declaration that "[i]t is important to the concept of self-government that tribes reduce their dependence on Federal funds," *id.* at 217 n.20, precluded state authority in all but the rare instances where a State prohibits gaming categorically. In sum, the tribes' conduct of gaming in their governmental capacity led this Court to sustain tribal gaming, as its landmark conclusion in *Cabazon* makes clear. "State regulation [of tribal gaming] would impermissibly infringe on tribal government." *Id.* at 222.

IGRA confirms tribal gaming as a governmental activity. The IGRA Congress found that a "principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701(4), and declared the first purpose of IGRA to be "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Thus, even if Congress or this Court were to adopt a "governmental" versus "commercial" dichotomy, tribal gaming would clearly qualify as the former. "Formal gaming in Indian country is a governmental activity." Stephen Cornell, *The Political Economy of American Indian Gaming*, Ann. Rev. L. & Soc. Sci. 63, 64 (2008).

The distinction also fails as public policy. A modern hallmark of federal policy has been to foster economic development as a means for tribal governments to provide for the health and welfare of their citizens. Tribal governments have extremely limited tax bases. Their

small numbers of members already pay federal and often state income taxes. *Choteau v. Burnet*, 283 U.S. 691 (1931) (federal); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-67 (1995) (state). And this Court has upheld the ability of states to tax economic activity with a strong nexus to Indian country in a way that has, as a practical matter, precluded tribal taxation of the same activity. *See, e.g., Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175-76 (1989). To minimize their dependence on federal funds, then, tribes must engage in revenue-generating activities, much as States have relied on lotteries and other enterprises to fortify their own revenue stream. Congress has wisely chosen not to chill economic development by stripping Tribes of the ability to control their exposure to ruinous litigation while engaged in these pursuits.

3. No sound basis exists to give Alabama the hammer it seeks to bludgeon tribal governments.

Alabama argues that tribal immunity should not bar suits for prospective relief. Michigan and Oklahoma do not make this argument, for good reason. It defies the very concept of sovereign immunity, which "does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit." *Fed. Maritime Comm'n*, 535 U.S. at 766; *see also Seminole Tribe*, 517 U.S. at 58. Accordingly, this Court has flatly rejected Alabama's argument. *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 514 (1991) ("there is no doubt that sovereign immunity bars the State from" suing tribes prospectively to require collection of State sales taxes); *Puyallup Tribe*, 433 U.S. at 167-68.

Alabama reveals the animus towards tribal sovereignty underlying its position: "Given the federal government's plenary power to create, destroy, and otherwise control the tribes, notions of inherent sovereignty do not justify immunity from litigation. A federal court, no less than the federal Congress, can coerce an Indian tribe's obedience without diminishing the tribe's uniquely 'dependent' sovereignty." Brief for Alabama ("Ala. Br.") 10. This is a gross misstatement of federal law. "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *Cabazon*, 480 U.S. at 207 (internal quotation marks omitted), and this Court has never sanctioned a state's ability to "coerce an Indian tribe's obedience" through the federal courts.[20]

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[20] Alabama's purported justifications for such coercion—gaming device classification, consumer lending, and campaign finance, Ala. Br. 13-16—are unconvincing. The NIGC has primary authority to distinguish between Class II and Class III devices, and has issued over 100 opinions on that issue. *See* http://www.nigc.gov/Reading_Room/Game_Classification_Opinions.aspx. Judicial review of such determinations is often available. *See, e.g., Diamond Game Enters. Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000) (Tribes and States, including Alabama, intervene in suit over game classification). States may also compact with Tribes over these issues. Alabama has steadfastly refused to do so, and should not be heard now to complain of the consequences of its election.

Federal regulators closely scrutinize consumer lending issues, *see, e.g., FTC v. Payday Financial LLC*, 2013 WL 5442387 (D.S.D. Sept. 30, 2013); CFPB Order (Sept. 26, 2013) (investigating tribal lenders), *available at* http://www.cfpbmonitor.com/files/2013/09/201309_cfpb_decision-on-petition_great-plains-lending-to-set-aside-civil-investigative-demands1.pdf, and, as Alabama's brief makes clear, States are not bereft of means to address the issue either. *See* Ala. Br. 13. Regarding campaign finance, Alabama has not demonstrated that a problem exists, *see id.* at 14 (cit-

To its credit, Michigan does not take this position. This litigation has undoubtedly been frustrating for Michigan, but there are far better ways, as canvassed above, to address those frustrations than to upend the centuries-old understanding of the relationship between states and tribes, as Alabama urges here. Michigan's own experience illustrates well how states and tribes can cooperate for the common good when they respect one another's sovereignty and negotiate issues including immunity.

Michigan has consistently recognized tribal sovereignty and immunity. In 2001, then-Governor John Engler issued a Policy Statement on State-Tribal Affairs, Executive Directive No. 2001-2, which recognized that

> [l]ike the State of Michigan, the twelve tribes are sovereign governments, recognized by the Constitution of the United States of America, decisions of the United States Supreme Court and acts of Congress.
>
> ...
>
> As sovereign governments living together, it is nevertheless inevitable that the State and

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ing only cases decided in the State's favor), or that available remedies are inadequate. *See, e.g., Agua Caliente Band v. Superior Court*, 10 Cal. Rptr. 3d 679, 695 (Cal. Ct. App. 2004) (dissent). By contrast, examples abound of States—including Alabama—invoking Eleventh Amendment immunity to avoid federal legal obligations. *See, e.g., Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Alabama invoking immunity against ADA suit for money damages); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (same, ADEA suit for damages and prospective relief); *see also Poarch Band of Creek Indians v. State of Alabama*, 776 F. Supp. 550, 552 (S.D. Ala. 1991) (same, tribal suit for prospective relief under IGRA).

> tribes sometime come into discord. In such cases, the appropriate means for governments to resolve differences is through a process of discussion and negotiation, resorting to litigation only when this course is unavoidable.

Available at http://www.michigan.gov/documents/som/2002_Tribal-State_Accord_195712_7.pdf. This Directive was incorporated into a 2002 State-Tribal Accord, *see id.*, which "provid[ed] a framework for a government-to-government relationship," *id.* at Preamble, and reiterated that the Tribes and State "respect the sovereignty of each other," *id.* at Section III. Accordingly, the Accord expressly preserved the parties' sovereign immunity. *Id.* at Section VI ("In executing this accord, no party waives any rights (including treaty rights), immunities (including sovereign immunities), or jurisdiction.").

Under the 2002 Accord, the State and Tribes have negotiated numerous agreements regarding taxation, law enforcement, economic development, and environmental preservation. *See* http://www.michigan.gov/som/0,1607, 7-192-29701_41909—,00.html (collecting Tribal-State Accords). A number of these accords expressly address sovereign immunity. For instance, the taxation accords contain an arbitration provision favoring voluntary dispute resolution over mandatory process. *See* Bay Mills Tax Agreement Section XIV. If negotiations fail, the Tribes consent to suit in tribal court by the State to compel arbitration, *see id.* Section (G)(1)(B), while the State does the same in state court for that purpose, *see id.* Section (G)(2).

Thus, Michigan and the Tribes within its borders have consistently recognized and respected each other's sovereignty and immunities. They have favored

negotiation and voluntary dispute resolution over litigation, and have crafted narrow remedies for specific concerns. This approach has worked well, and is far superior to that which Alabama urges upon the Court.

CONCLUSION

If the Court concludes that Section 2710(d)(7)(A)(ii) does not extend to the State's claims, no jurisdictional or substantive basis exists for the broad reconsideration of tribal sovereign immunity urged by Michigan and its *amici*.

Respectfully submitted.

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STATE OF MICHIGAN,

Petitioner,

v.

BAY MILLS INDIAN COMMUNITY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATE OF OKLAHOMA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF AMICUS TO FILE 1

STATEMENT 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. Federal Courts Have Federal Question Jurisdiction To Determine Whether Tribal Gaming Complies With IGRA 6

II. IGRA Separately Supplies Federal Courts With Subject Matter Jurisdiction Over IGRA-Based Disputes 7

III. Indian Tribes Should Not Be Entitled To Sovereign Immunity From Suits Brought By States 10

CONCLUSION 16

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Brown v. Cheyenne Arapaho Tribes, Okla., No. CIV-10-970-R, 2010 WL 9473334 (W.D. Okla. Nov. 3, 2010) 13

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001) 14

Citizens Potawatomi Nation v. Freeman, 113 F.3d 1245 (10th Cir. 1997) 14

Comanche Indian Tribe of Oklahoma v. 49, L.L.C., 391 F.3d 1129 (10th Cir. 2004) 14

Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140 (10th Cir. 2011) 2, 10, 13

Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006) 6

Ex Parte Young, 209 U.S. 123 (1908) 2, 10, 11

Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010) 7

Funk v. United States, 290 U.S. 371 (1933) 15

Harris v. Muscogee (Creek) Nation, No. 11-CV-654-GKF-FHM, 2012 WL 2279340 (N.D. Okla. June 18, 2012) 13

Jaffee v. Redmond, 518 U.S. 1 (1996) 15

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) 5, 10, 12, 14

TABLE OF AUTHORITIES – Continued

Page

Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F.Supp.2d 1131 (N.D. Okla. 2001) 14

Native American Distributing v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288 (10th Cir. 2008) 14

Nevada v. Hall, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) 12

New Gaming Systems, Inc. v. National Indian Gaming Comm'n, 896 F.Supp.2d 1093 (W.D. Okla. 2012) 13

Oklahoma v. Hobia, 12-CV-054-GKF-TLW, 2012 WL 2995044 (N.D. Okla. July 20, 2012) 4, 9, 11

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 10

Swanda Brothers, Inc. v. Chasco Constructors, Ltd., L.L.P., No. CIV-08-199-D, 2012 WL 4382612 (W.D. Okla. Sept. 25, 2012) 13

United States ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc., 883 F.2d 886 (10th Cir. 1989) 14

United States ex rel. Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Oklahoma, No. CIV-09-730-M, 2011 WL 308889 (W.D. Okla. Jan. 26, 2011) 13

Wells Fargo Bank, N.A. v. Maynahonah, No. CV-11-648-D, 2011 WL 3876255 (W.D. Okla. Sept. 2, 2011) 13

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Bittle v. Bahe, 2008 OK 10, 192 P.3d 810 14

Dilliner v. Seneca-Cayuga Tribe, 2011 OK 61, 258 P.3d 516 13

State ex rel. Edmondson v. Native Wholesale Supply, 2010 OK 58, 237 P.3d 199 14

Waltrip v. Osage Million Dollar Elm Casino, 2012 OK 65, 290 P.3d 741 13

FEDERAL STATUTES

25 U.S.C. § 2710(d)(7)(A)(ii) 7, 8

28 U.S.C. § 1331 .....6, 7, 10

28 U.S.C. §§ 1346(a)(2), 1491 11

28 U.S.C. §§ 1346(b), 2674 11

28 U.S.C. § 1602 *et seq.* 15

STATE STATUTES

21 O.S. § 941 2

21 O.S. § 973 2

STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF AMICUS TO FILE[1]

The State of Oklahoma as amicus has an interest in the decision because the State is home to 38 federally-recognized Indian tribes, the large majority of which have entered into gaming compacts with the State, as authorized by the Indian Gaming Regulatory Act (IGRA). The State of Oklahoma fully supports the arguments made by Michigan in its opening brief, but writes this brief to offer its unique perspective as the state that is home to more Indian casinos than any other state, and where Indian gaming is a $3.48 billion/year business.

The State sometimes must take action against tribes conducting gaming not authorized by their compacts, including taking action in federal court under IGRA. If the decision below is affirmed, the State's ability to prevent harmful illegal gaming will be hampered.

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[1] Pursuant to Rule 37.6, the State of Oklahoma affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than the State of Oklahoma or its counsel made such a monetary contribution.

STATEMENT

When the State of Oklahoma learns that an Indian tribe is conducting illegal Class III gaming within its border, it has several options to remedy the problem.

First, it could charge the culpable individual tribal members with crimes under state law. *See, e.g.*, 21 O.S. § 941 (criminalizing gaming and providing for penalties and a minimum one-year prison sentence for those conducting illegal gaming). Second, it could bring a state law-based *in rem* action to seize the illegal gaming machines. *See, e.g.*, 21 O.S. § 973 (authorizing seizure of illegal gaming machines). Third, it could seek to enjoin the tribe from continuing the illegal gaming – the tribe, however, will almost certainly claim that it is immune from suit. Fourth, it could bring an *Ex Parte Young* action seeking to enjoin the individual tribal officials responsible for the illegal gaming – although this too usually results in a claim of sovereign immunity.[2]

As counterintuitive as it may seem, it is this latter option – the least drastic of the lot – that the Bay Mills Indian Community seeks to abolish. As a matter of policy, this is a terrible idea. First, it invites tribes to open illegal casinos and then claim sovereign

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[2] This has been Oklahoma's experience even in a circuit like the Tenth, which has correctly recognized that *Ex Parte Young* actions against tribal officials are permissible, *see, e.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011).

immunity and lack of jurisdiction when a State asks a federal court to step in and enjoin the illegal gaming – something Oklahoma knows all too well as a party to a pending case where exactly that is happening. Second, it forces States like Michigan and Oklahoma to in the future jump directly to the more aggressive options available to them – most likely the filing of criminal charges against tribal officials and seizing of gaming equipment.

These concerns are particularly troubling to States because they effectively bear sole responsibility for policing illegal tribal gaming within their borders. The National Indian Gaming Commission (NIGC) in fact self-reports a role that is largely deferential to the tribes it purports to regulate: "tribal gaming commissions are the primary regulators of gaming operations. The role of the Commission is to monitor and validate the work of tribal gaming regulators." NIGC, "Frequently Asked Questions," http://www.nigc.gov/Portals/0/NIGC%20Uploads/aboutus/FAQ06032013vs2.pdf (last visited on August 30, 2013).

So while the United States may have intimated in its invitation brief that review was unnecessary because the United States itself "has criminal and civil enforcement Authority," U.S. Cert. Br. 19, Oklahoma, like Michigan, knows from experience that when tribes illegally game, it is the States who must act to stop them – even when the NIGC has properly declared tribal gambling illegal it has declined to

initiate enforcement. Waiting on the federal government to act has not proved a viable option.[3]

Thus, because it involves the availability of a valuable remedy used by States to prevent illegal gaming, the importance of this case and the need for reversal cannot be overstated. Indian gaming is an ever expanding, multi-billion dollar business and it exists because of IGRA. When an Indian tribe purports to rely on IGRA to conduct gaming, but is actually flaunting IGRA's requirement that the gaming occur on the tribe's Indian land, surely federal

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[3] Three recent examples bear this out. First, a dispute with the Kialegee Tribal Town that has prompted litigation currently pending before the Tenth Circuit. *See Oklahoma v. Hobia*, 12-CV-054-GKF-TLW, 2012 WL 2995044 (N.D. Okla. July 20, 2012). There, the National Indian Gaming Commission (NIGC) determined that the land on which the Kialegee tribe was building a Class III gaming facility was not the tribe's "Indian land" because the tribe did not have legal jurisdiction over the land, but the NIGC merely threatened enforcement action if gaming occurred – something the State had been successful in enjoining *before* the NIGC issued its opinion. The second involves a dispute with the United Keetoowah Band where the tribe was operating a Class III facility that the NIGC determined was not on "Indian lands," yet the NIGC disavowed jurisdiction over the casino site – allowing the casino to continue to operate with impunity from federal enforcement action. The third involves a dispute with the Alabama-Quassarte Tribe, where the NIGC told the tribe that it had no lands upon which it could lawfully game under IGRA, yet stood idly by when the tribe nonetheless opened a Class III facility.

courts have jurisdiction to enjoin that illegal gaming. The Sixth Circuit's decision should be reversed.

SUMMARY OF THE ARGUMENT

1. Federal courts have general federal question jurisdiction to resolve disputes over whether a tribe's Class III facility is authorized by IGRA.

2. IGRA separately provides federal courts with jurisdiction to resolve disputes over whether a tribe's Class III facility is authorized by IGRA. The Sixth Circuit's decision to the contrary defied congressional intent to provide states with a federal court forum to resolve such disputes, and puts the incentives in all the wrong places, by giving tribes a reason to move Class III gaming activities off of their Indian lands.

3. Tribal sovereign immunity from suits brought by states is inappropriate in the modern age of commercial tribal activity, and it provides tribes with greater immunity from suit than that enjoyed by the states, the United States, and foreign nations. The Court should revisit its holding in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 762 (1998), and abolish tribal sovereign immunity in the context of suits brought by states to enjoin unlawful commercial activity occurring outside of a tribe's Indian land.

ARGUMENT

I. Federal Courts Have Federal Question Jurisdiction To Determine Whether Tribal Gaming Complies With IGRA.

The legality of the Class III gaming conducted by the Bay Mills tribe depends on whether that gaming is authorized by IGRA. If it is, the tribe's gaming compact with the State of Michigan allows the gaming. Any enforcement action taken by Michigan would thus begin with a threshold question of federal law.

So when Michigan sued seeking a determination that the gaming is not authorized by IGRA, the suit necessarily arose "under the . . . laws . . . of the United States." 28 U.S.C. § 1331. This is so because Section 1331 provides jurisdiction when the "complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 690 (2006).

The district court could not resolve Michigan's claims without answering the substantial federal law question of whether Bay Mills' gaming violated IGRA and the tribe's federally-approved gaming compact. As a result, Michigan's allegation in the complaint that the Bay Mills casino was not on Indian land and thus not authorized by IGRA supported the court's jurisdiction because to resolve the case the district court *had* to apply IGRA to the facts to determine whether the gaming was federally authorized. There

was no avoiding the substantial threshold federal question that triggered the district court's jurisdiction under Section 1331.

II. IGRA Separately Supplies Federal Courts With Subject Matter Jurisdiction Over IGRA-Based Disputes.

The Sixth Circuit should also have concluded that the district court had jurisdiction based on a provision in IGRA that provides that federal district courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact" entered into pursuant to IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii).

By taking the narrow view that the reference to a violation "on Indian lands," was intended as a limitation on federal court jurisdiction, *see Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010) (only when Congress "expressly limits" Section 1331's expansive grant of federal question jurisdiction should a statute be read as narrowing the scope of that jurisdiction), the Sixth Circuit reached a counterintuitive result that ignored IGRA's intent to provide federal court jurisdiction for a State or Tribe to remedy IGRA compact violations.

Indeed, Congress couldn't have intended the absurdities that result when the Sixth Circuit's illogic

is applied. For example, if a tribe opened a 100-machine casino on Indian land, and complied with IGRA in all respects until one day it began using a single machine that was not authorized under the tribe's compact with the state, a federal court would have the power to enjoin the tribe from using that lone machine. But if the tribe moved its *entire casino* off Indian land, the federal court would suddenly be deprived of jurisdiction. In other words, federal courts would have jurisdiction to enjoin a gaming operation that was 1% out of compliance, but not a gaming operation that was 100% out of compliance. Section 2710(d)(7)(A)(ii) was surely intended as a means by which states could utilize the federal courts to prevent illegal gaming that a tribe purports to conduct under IGRA, rather than as a perverse incentive for tribes to ratchet up the egregiousness of their IGRA violations.

This is of particular concern to a state like Oklahoma, which despite its significant Indian population, has no Indian reservations. Indian lands make up a tiny percentage of the state's total land mass, and those Indian lands are fragmented throughout the state in a patchwork fashion. Because of this and tribes' desire to conduct gaming near population centers, the likelihood is magnified that a casino's illegality will be based on the operating tribe's failure to comply with IGRA's requirement that it be on the tribe's Indian land. History has borne this out, as Oklahoma's last three significant State/tribal gaming disputes have involved tribes attempting to operate casinos off their Indian land. *See* infra fn. 4.

Oklahoma v. Hobia is a particularly noteworthy example, and it illustrates how tribes are attempting to use the Sixth Circuit's decision to evade State enforcement of IGRA. 12-CV-054-GKF-TLW, 2012 WL 2995044 (N.D. Okla. July 20, 2012). *Hobia* was prompted by the Kialegee Tribal Town's construction of a Class III gaming facility in a suburb of Tulsa some 70 miles from the tribe's historic land base, and on a parcel of land owned by members of a different Indian tribe that was adjacent to residential neighborhoods, a vocational school, and a proposed elementary school. The State of Oklahoma sought a declaration that the casino was not authorized by IGRA because it was not located on the "Indian land" of the Kialegee Tribal Town, as well as an injunction prohibiting tribal officials and a gaming corporation from conducting Class III gaming at the site. The district court granted declaratory and injunctive relief in Oklahoma's favor, and the tribal defendants appealed. The NIGC subsequently confirmed that the parcel was not the Tribal Town's "Indian land" and was thus not land upon which the tribe could game under IGRA. On appeal, the tribal defendants rely heavily on the Sixth Circuit's opinion, arguing that the court did not have subject-matter jurisdiction, and that the defendants' sovereign immunity had not been abrogated because the lawsuit sought to prohibit gaming on lands that the State of Oklahoma had alleged were not the tribe's Indian lands. In other words, the tribal defendants argue that the Sixth Circuit's decision stands for the proposition that federal courts lack jurisdiction over IGRA cases such

as this, *even when it is undisputed that the illegal gaming is occurring on Indian lands* (just not the Indian lands of the tribe seeking to game upon it).

The Sixth Circuit's decision thus needs to be reversed both because of its illogic and its unintended practical effects.

III. Indian Tribes Should Not Be Entitled To Sovereign Immunity From Suits Brought By States.

The Sixth Circuit correctly concluded that Section 1331 conferred federal question jurisdiction over Michigan's state- and federal-common law-based claims, but the court incorrectly concluded that the tribe was immune from suit on those claims. That holding opened the door for this Court to revisit its opinion in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 762 (1998), and the Court should do just that.

As an initial matter, while "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), tribal officials, engaging in continuing violations of federal law, are not immune from suit under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The Tenth Circuit has correctly recognized the doctrine's applicability to tribal disputes, *see, e.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011). But as Michigan points

out, other courts have been inconsistent in applying this exception to sovereign immunity. As a result, states cannot confidently rely on *Ex Parte Young* actions as a viable vehicle for obtaining declaratory and injunctive relief. Even in states in circuits with precedent supporting such suits, tribal officials reflexively argue that tribal sovereign immunity defeats jurisdiction. *See, e.g., Oklahoma v. Hobia*, 12-CV-054-GKF-TLW, 2012 WL 2995044 (N.D. Okla. July 20, 2012) (where the defendant tribal officials argued that tribal sovereign immunity precluded the court from enjoining even the officials).

In other words, the *Ex Parte Young* option *should* be available to states like Michigan, but the unreliability of that option cuts in favor of recognition that, as a general matter, tribal sovereign immunity should not apply in suits brought by sovereign states to enjoin commercial activities occurring off a tribe's Indian lands:

> Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities. *See* 28 U.S.C. §§ 1346(b), 2674 (Federal Tort Claims Act); §§ 1346(a)(2), 1491 (Tucker Act). Congress has also decided in the Foreign Sovereign Immunities Act of 1976 that foreign states may be sued in the federal and state courts for claims based upon commercial activities carried on in the United

> States, or such activities elsewhere that have a "direct effect in the United States." § 1605(a)(2). And a State may be sued in the courts of another State. *Nevada v. Hall*, 440 U.S. 410 (1979).

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 762 (1998) (Stevens, J., dissenting).

Why so, indeed. Tribal sovereign immunity was "developed almost by accident," *id.* at 756, "extends beyond what is needed to safeguard tribal self-governance," *id.* at 758, is "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities," *id.*, and "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* Remarkably, those were the words of the six-justice majority that chose to "defer to Congress" and affirmed the continuing validity of the doctrine.

Regardless of whether the *Kiowa* majority's decision to "defer" was correct then, the 15 years of congressional inaction that have followed – all the while the concerns that the majority voiced have been magnified in every respect by the explosion in purely

commercial tribal activity[4] – counsel that deference is no longer appropriate. Congress may have failed to

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[4] Oklahoma's experience with the recent explosion in its tribes' gaming revenues and use of those revenues to diversify into complex commercial entities bears out this point. As Oklahoma tribes have expanded into enterprises as diverse as chocolate making, filmmaking, hotels, restaurants, defense contracting, etc., sovereign immunity has been increasingly used as a defense in suits of a commercial, rather than sovereign/governmental nature. *See, e.g.*, *Swanda Brothers, Inc. v. Chasco Constructors, Ltd., L.L.P.*, No. CIV-08-199-D, 2012 WL 4382612, at *1 (W.D. Okla. Sept. 25, 2012) (discussing tribe's attempt to advance sovereign immunity in commercial contract dispute); *New Gaming Systems, Inc. v. National Indian Gaming Comm'n*, 896 F.Supp.2d 1093, 1098 (W.D. Okla. 2012) (noting tribal court's application of sovereign immunity in commercial contract dispute); *Waltrip v. Osage Million Dollar Elm Casino*, 2012 OK 65, ¶ 1, 290 P.3d 741, 742 (noting tribe's and insurance company's argument that sovereign immunity blocked employee's worker's compensation claim); *Harris v. Muscogee (Creek) Nation*, No. 11-CV-654-GKF-FHM, 2012 WL 2279340, at *1 (N.D. Okla. June 18, 2012) (noting tribe's argument that sovereign immunity would block negligence claim by patron of tribal business); *Wells Fargo Bank, N.A. v. Maynahonah*, No. CV-11-648-D, 2011 WL 3876255, at *2-3 (W.D. Okla. Sept. 2, 2011) (noting tribe's argument that sovereign immunity should block suit over lease dispute); *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶ 1, 258 P.3d 516, 517 (noting tribe's argument against waiver of sovereign immunity in employment contract dispute); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153-56 (10th Cir. 2011) (reasoning that sovereign immunity did not block suit to enjoin tribal judge from refusing payment of lawyer fees); *United States ex rel. Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Oklahoma*, No. CIV-09-730-M, 2011 WL 308889, at *1 (W.D. Okla. Jan. 26, 2011) (noting a tribe's sovereign immunity argument meant to block a breach-of-contract suit in commercial dispute); *Brown v. Cheyenne Arapaho Tribes, Okla.*, No. CIV-10-970-R, 2010 WL 9473334, at *1-2 (W.D. Okla. Nov. 3, 2010)

(Continued on following page)

act, but that does not mean we are stuck with a doctrine so poorly fitted to the realities of modern tribal activity. The doctrine of tribal sovereign immunity is judge-made federal common law that this Court has the power to modify based on changed

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(granting tribe's motion to dismiss because tribal sovereign immunity blocked former business employees' suit); *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶ 31-32, 237 P.3d 199, 210 (noting business's argument that its association with tribe blocked state regulation of cigarette distribution because of tribal sovereign immunity); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1290 (10th Cir. 2008) (holding that tribal sovereign immunity blocked suit against tribal tobacco business by distributor in commercial contract suit); *Bittle v. Bahe*, 2008 OK 10, ¶ 1, 192 P.3d 810, 812 (noting tribe's argument that sovereign immunity prevented suit arising from state alcoholic beverage sale laws); *Comanche Indian Tribe of Oklahoma v. 49, L.L.C.*, 391 F.3d 1129, 1130-31 (10th Cir. 2004) (noting tribe's arguments that sovereign immunity should prevent arbitration clause enforcement in commercial litigation initiated by tribe); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 414 (2001) (rejecting tribe's argument that sovereign immunity blocked enforcement of arbitration award); *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F.Supp.2d 1131, 1133-34 (N.D. Okla. 2001) (noting tribe's argument that sovereign immunity blocked copyright infringement and other claims arising from commercial dispute); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753-54 (1998) (chronicling tribe's assertion of sovereign immunity in commercial contract dispute); *Citizens Potawatomi Nation v. Freeman*, 113 F.3d 1245 (10th Cir. 1997) (noting tribe's attempt to assert sovereign immunity in collateral attack on state court judgment); *United States ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc.*, 883 F.2d 886, 887-88 (10th Cir. 1989) (noting tribe's argument that sovereign immunity allowed it to void commercial contract).

circumstances. *See Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) ("[T]he common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."); quoting *Funk v. United States*, 290 U.S. 371, 383 (1933).

The Court should exercise that power and modify the doctrine. There is simply no good reason that tribes should be entitled to sovereign immunity from suits brought by states to enjoin commercial activity happening off of the tribe's Indian land. As Michigan points out, the United States came to this realization with regard to foreign nations *decades ago*, when the judicially-created foreign sovereign immunity doctrine was narrowed to exclude immunity for the commercial acts of foreign nations. 28 U.S.C. § 1602 *et seq*. ("Foreign Services Immunities Act of 1976"). The explosion in commercial activity by tribes warrants a similar evolution in the common law of tribal immunity.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-515

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STATE OF MICHIGAN,

Petitioner,

v.

BAY MILLS INDIAN COMMUNITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR SCHOLARS OF AMERICAN INDIAN LAW AS *AMICI CURIAE* ON TRIBAL SOVEREIGN IMMUNITY IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE DISTRICT COURT'S JURISDICTION IS LIMITED TO THE ESTABLISHED REMEDY OF PROSPECTIVE RELIEF AGAINST TRIBAL OFFICERS. 2

II. TRIBAL SOVEREIGN IMMUNITY BARS DAMAGES CLAIMS AGAINST THE BAY MILLS INDIAN COMMUNITY. 5

A. Since Early Decisions, Tribal Sovereign Immunity Has Been Recognized by Federal Courts *In Pari Materia* with Federal and State Immunity. 5

B. Stripping Immunity in this Action to Saddle the Bay Mills Indian Community with a Damages Judgment Would Be Manifestly Unfair. 15

C. This Case Presents No Occasion to Review Immunity Policy. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Adams v. Murphy,
165 F. 304 (8th Cir. 1908) 12, 14

Alden v. Maine,
527 U.S. 706 (1999) 17

Atkinson Trading Co. v. Shirley,
532 U.S. 645 (2001) 4

In re Ayers,
123 U.S. 443 (1887) 11, 12

Beers v. Arkansas,
61 U.S. (20 How.) 527 (1857) 11

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,
532 U.S. 411 (2001) 15, 18

Chadick v. Duncan,
No. 15,317 (D.C. Mar. 3, 1894) 10, 11

Cherokee Nation v. Georgia,
30 U.S. (5 Pet.) 1 (1831) 8, 9

Chisholm v. Georgia,
2 U.S. (2 Dall.) 419 (1793) 6

Dickerson v. United States,
530 U.S. 428 (2000) 16

Doe v. Santa Clara Pueblo,
154 P.3d 644 (N.M. 2007) 19

Edelman v. Jordan,
415 U.S. 651 (1974) 7

Hans v. Louisiana,
134 U.S. 1 (1890) 6, 7, 16

Hargrove v. Town of Cocoa Beach,
96 So. 2d 130 (Fla. 1957) 17

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,
523 U.S. 751 (1998) 13, 15, 17

Lane v. Pueblo of Santa Rosa,
249 U.S. 110 (1919) 9, 10

Navajo Nation v. United States,
537 U.S. 488 (2003) 18

Oklahoma Tax Commision v. Citizen Band Potawatomi Indian Tribe,
498 U.S. 505 (1991) 16

Parks v. Ross,
52 U.S. (11 How.) 362 (1851) 10

Pennhurst State School and Hospital v. Halderman,
465 U.S. 89 (1984) 17

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 1, 3, 4

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996).....2, 17

South Dakota v. Bourland,
508 U.S. 679 (1993).....4

Strate v. A-1 Contractors,
520 U.S. 438 (1997).....4

Thebo v. Choctaw Tribe of Indians,
66 F. 372 (8th Cir. 1895).....11, 12, 14

Turner v. United States,
51 Ct. Cl. 125 (1916) 13

Turner v. United States,
248 U.S. 354 (1919).....13, 14

United States v. IBM Corp.,
517 U.S. 843 (1996).....16

United States v. Maine,
420 U.S. 515 (1975).....16

United States v. United States Fidelity & Guaranty Co.,
309 U.S. 506 (1940).....14, 15

Welch v. Texas Department of Highways and Public Transportation,
483 U.S. 468 (1987).....16

Whitney v. Worcester,
366 N.E.2d 1210 (Mass. 1977).....17

Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832).....9

Ex parte Young,
209 U.S. 123 (1908) 7, 15

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XI 6

STATUTES

5 U.S.C. § 702 16

25 U.S.C. § 81(d)(2) 18

25 U.S.C. § 450f(c) 18

25 U.S.C. § 2710(d)(1) 1, 2

25 U.S.C. § 2710(d)(7)(A)(ii) 3, 4, 5

28 U.S.C. § 1331 2

28 U.S.C. § 2402 18

Act of May 29, 1908, ch. 216, 35 Stat. 444 ..... 12, 13

Colo. Rev. Stat. § 24-10-114 (2013) 17

Judiciary Act of 1789, 1 Stat. 73 10

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(2012) 18

The Federalist No. 81 6

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Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137 (2004) 6

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INTEREST OF *AMICI CURIAE*

Amici curiae are experienced teachers and scholars of American Indian law. Professor Charles Wilkinson is Distinguished Professor and Moses Lasky Professor of Law at the University of Colorado Law School. Professor Alexander Tallchief Skibine is S.J. Quinney Professor of Law at the S.J. Quinney College of Law at the University of Utah. Professor Richard B. Collins and Professor Sarah A. Krakoff are Professors of Law at the University of Colorado Law School. *Amici* offer this brief to clarify the doctrine of tribal sovereign immunity as it applies to this case.[1]

SUMMARY OF ARGUMENT

The Questions Presented ask only whether the District Court can decide whether Bay Mills' Vanderbilt gaming facility is located on "Indian lands," as that term appears in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1), and can enjoin the facility if it is illegal. The established rules of this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), make it clear that had Michigan simply sued relevant tribal officials, the District Court could have addressed the merits of those questions. Instead, in an apparent attempt to get this Court to restrict tribal immunity in a case where that is not properly at issue, Michigan sued only the Bay Mills tribe by name, which *Santa Clara* held it cannot do.

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[1] No counsel for a party authored this brief in whole or in part, and no party or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties' written consents are on file with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Michigan's amended complaint names tribal officials, so that the Questions Presented can be fully addressed by simply remanding to the District Court to proceed against them under *Santa Clara*. However, Michigan's amended complaint also adds a claim for damages against Bay Mills. If the Court elects to decide whether that claim is valid, it should be rejected. Federal courts have consistently upheld the policy of tribal immunity from the earliest relevant decisions in the nineteenth century. To modify immunity retroactively in this case would be manifestly unfair to Bay Mills. Moreover, modern policy concerns about the doctrine are currently being addressed by tribes and Congress and are not presented by the facts of this case.

ARGUMENT

I. THE DISTRICT COURT'S JURISDICTION IS LIMITED TO THE ESTABLISHED REMEDY OF PROSPECTIVE RELIEF AGAINST TRIBAL OFFICERS.

Michigan's compact with the Bay Mills Indian Community provides for arbitration of disputes, and several briefs in this Court argue that remedy is exclusive. Other briefs argue that the Indian Gaming Regulatory Act ("IGRA") provides exclusive remedies, as this Court held in a different context in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In the alternative, the State has an established federal remedy against tribal officers and no basis for suit against the Bay Mills Indian Community.

The Court of Appeals decided that the question whether Bay Mills' Vanderbilt land is "Indian lands" as that term is used in IGRA, 25 U.S.C. § 2710(d)(1), arises under federal law so that 28 U.S.C.

§ 1331 provides federal district court jurisdiction. 695 F.3d 406, 413. That court also held that the claim against the tribe is barred by the tribe's governmental immunity from suit. *Id.* at 413–16. The court did not address the question whether prospective relief can be obtained against an appropriate executive officer of the Bay Mills tribe, although it remanded to allow such a claim to be made. *Id.* at 416–17. As explained below, such relief can be granted based on this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and that is the State's only remedy.

Michigan claims that the District Court had subject matter jurisdiction under IGRA's jurisdictional provision, 25 U.S.C. § 2710(d)(7)(A)(ii), which grants federal district courts jurisdiction over claims "to enjoin a class III gaming activity . . . conducted in violation of any Tribal-State compact . . . that is in effect." Pet'r Br. 20–21. The State further claims that this statute implicitly abrogates tribal immunity from suit. *Id.* at 30. Relying on the latter claim, the State's initial complaint named only the Bay Mills Indian Community as a party defendant. 695 F.3d at 410. While the State's interlocutory appeal was pending in the Court of Appeals, the State moved to amend its complaint to seek relief against tribal officials, and the District Court granted the motion. *See id.* at 416; J.A. 120.

Lower courts have differed in their interpretations of § 2710(d)(7)(A)(ii), as the Court of Appeals noted. 695 F.3d at 414–15. Some courts have opined that when the provision applies, it implicitly overrides tribal immunity for injunctive actions brought under the statute. *See id.* However, this view is mistaken for two reasons. First and most important, the statute's purpose can be fully achieved by the estab-

lished remedy of suits against tribal officials, as this Court held in *Santa Clara*. *Santa Clara* involved a claim for prospective, equitable relief. 436 U.S. at 51. The Court held that the Pueblo's immunity barred suit against it by name. *Id.* at 58–59. But the Court also upheld federal jurisdiction to grant prospective, equitable relief against the Pueblo's governor, its chief executive officer. *Id.* at 59.[2]

Second, because § 2710(d)(7)(A)(ii) does not explicitly override tribal immunity and its purpose can be fully achieved without an override, none should be implied under the established rule that overrides and waivers of immunity should be clearly expressed or necessarily implied. *See id.* at 58–59.

For these reasons, whether or not Michigan's claim comes within § 2710(d)(7)(A)(ii), the District Court had subject matter jurisdiction and authority to grant prospective relief over tribal officials that would bind the Tribe based on well-established law. That is all that Michigan's questions presented in this Court seek. Therefore the case should be remanded to the District Court with instructions to proceed against tribal officials based on Michigan's amended complaint. Claims against the Bay Mills Indian Community by name should be dismissed.

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[2] Since *Santa Clara*, many other suits against tribal officers for prospective relief to determine the boundaries of tribal authority have been reported. *E.g.*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

II. TRIBAL SOVEREIGN IMMUNITY BARS DAMAGES CLAIMS AGAINST THE BAY MILLS INDIAN COMMUNITY.

The State's brief to this Court states its questions presented to seek only equitable relief, Pet'r Br. at i, and the brief cites *Santa Clara*, *see id.* at 3, 30. But the State carefully avoids any mention of the availability of prospective relief against tribal officials under the *Santa Clara* holding. Instead, the State mounts a general attack on tribal sovereign immunity, asking the Court to reverse decisions that recognize tribal immunity.

For these reasons, the State's brief read in isolation appears to be an attempt to get this Court to open up tribes to judgments for damages in a case where that is not at issue. However, an aspect of the case not disclosed by the State's brief in this Court is the claim in its amended complaint to recover damages from Bay Mills measured by its profits at the Vanderbilt facility. J.A. 132–34.

To the extent that the State relies on § 2710(d)(7)(A)(ii), there is clearly no basis to award damages. The statute authorizes only injunctive relief, and it does not explicitly say anything about tribal immunity. The State's broader claim to overturn tribal immunity *in toto* should be rejected as explained below.

A. Since Early Decisions, Tribal Sovereign Immunity Has Been Recognized by Federal Courts *In Pari Materia* with Federal and State Immunity.[3]

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[3] This part of the brief is based on research in William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587 (2013); Katherine Florey, *Sove-*

(1) The doctrine of governmental immunity from suits for damages was, from the outset, treated as received law by American courts. The initial understanding was expressed in The Federalist No. 81: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." It was further illustrated by the reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which promptly led to the adoption of the Eleventh Amendment, U.S. Const. amend. XI. In *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court exhaustively reviewed the doctrine, concluding:

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judg-

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reign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine, 43 Wake Forest L. Rev. 765 (2008); Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137 (2004); and Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661 (2002).

> ment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

Id. at 21.

To the limited extent that courts reviewed the policy, it was sustained based on precedent and on the doctrine of separation of powers: the theory that government payments must originate in the legislative branch absent express consent in a statute, as the *Hans* opinion stated. It was further backed by rules of international law.

Received law also included writ practice, which allowed prospective relief against government officers in certain cases. That concept was extended to enforcement of federal law against state officers in *Ex parte Young*, 209 U.S. 123 (1908). Over time the division between forbidden suits against governments by name and suits for prospective relief against officers became the general rule that is in force today. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 664 (1974).

(2) Indian tribes were brought into this pattern of received law as soon as the issue reached federal courts. The first stage was this Court's recogni-

tion of the governmental status of tribes in constitutional law, a contested issue in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). As Chief Justice Marshall stated for the Court:

> Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution? . . . So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

Id. at 16.[4]

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[4] Chief Justice Marshall's reference to "a majority of the judges" referred to himself, Justice McLean who joined his opinion, and Justices Story and Thompson, whose opinion agreed with the quoted language but dissented on the ultimate ques-

The point was strongly restated in the Court's opinion (for a 6-1 majority) in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832): "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . ." *Id.* at 519.

A variation of the issue arose later, when the Federal Government argued, in *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), that *Cherokee Nation* had held that tribes lacked sovereign capacity to sue. This Court unanimously rejected the claim:

> The case of *Cherokee Nation v. Georgia*, on which the defendants place some reliance, is not in point. The question there was not whether the Cherokee tribe had the requisite capacity to sue in a court of general jurisdiction, but whether it was a "foreign state" in the sense of the judiciary article of the Constitution and therefore entitled to maintain an original suit in this court against the State of Georgia. The court held that the tribe, although uniformly treated as a distinct political society capable of engaging in treaty stipulations, was not a "foreign state" in the sense

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tion whether the Cherokee Nation was a foreign state as that term appears in Article III. *See Cherokee Nation*, 30 U.S. at 53–54, 80 (Thompson, J., dissenting). Justices Baldwin and Johnson concurred in the judgment, agreeing with Chief Justice Marshall that the Cherokee Nation was not a foreign state but disagreeing with his quoted language. *See id.* at 21–22, 27 (opinion of Johnson, J.); *id.* at 47, 49–50 (opinion of Baldwin, J.). Justice Duvall was absent. Thus, Chief Justice Marshall's majority was a 4-2 vote for the quoted language.

> intended, and so could not maintain such a suit.

Id. at 112–13 (internal citation omitted).

(3) Tribes were seldom sued in federal courts until modern times, but in the few instances when they were, courts consistently held that governmental immunity protected them from unconsented lawsuits. The issue first arose in this Court indirectly in *Parks v. Ross*, 52 U.S. (11 How.) 362 (1851). George Parks sued John Ross, Principal Chief of the Cherokee Nation, for debts allegedly incurred for Cherokee removal in the late 1830s, the event commonly called the Trail of Tears. *Id.* at 373–74. The Court held that Ross had acted as an officer of the Cherokee Nation, which precluded personal liability against him. *Id.* at 374. The opinion invoked language traditionally used to describe state sovereign immunity, *see id.*, and it paralleled principles in the Judiciary Act of 1789, 1 Stat. 73, which prohibited federal court jurisdiction over foreign diplomats even though jurisdiction seemingly exists under Article III. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1590 (2002).

Chadick v. Duncan, No. 15,317 (D.C. Mar. 3, 1894), was the first recorded instance of a direct decision on tribal immunity, although the argument in the case referred to three earlier, unrecorded rulings dismissing suits against a tribe based on immunity from suit. The decision of the Supreme Court for the District of Columbia is unreported but recorded in the National Archives.[5] Edwin Chadick alleged that

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[5] No. 15,317 (D.C. Mar. 3, 1894) (available at Nat'l Archives & Records Admin. Record Group No. 376, Case File No. 314). For a detailed description of the case with page citations

the Cherokee Nation had breached a contract with him to sell its bonds. He sought an injunction to compel the Cherokee Nation, its principal chief and treasurer, and its delegates in Washington, D.C., to deliver the bonds to him.

The court dismissed the action based on tribal immunity from suit. The court relied on state and foreign sovereign immunity jurisprudence, which had developed substantially in the years after *Parks v. Ross*. These cases held that sovereign immunity applies to claims for injunctive relief as well as those seeking damages. The court concluded that tribes "are not amenable to suit anywhere at the instance of any private individual." The court cited and relied on this Court's contemporaneous immunity cases regarding actions against States and their officials arising out of bond defaults, particularly *In re Ayers*, 123 U.S. 443 (1887).[6]

The first reported decision in a suit against a tribe by name was *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895). George Thebo sued the Choctaw Nation and its principal chief and treasurer to recover attorney's fees allegedly owed to him. *Id.* at 373. The court upheld dismissal of the claim, citing this Court's decision in *Beers v. Arkan-*

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to the Archives record, *see* Wood, *supra* note 3, at 1641–45. For reference to the earlier, unreported rulings dismissing suits based on immunity, *see id.* at 1642 n.316.

[6] Chadick later appealed this decision to the Court of Appeals for the District of Columbia. A few days later, a bill to abrogate the Cherokees' immunity was introduced in the House of Representatives. It did not become law, however, and Chadick's appeal was dismissed for failure to print the transcript of records. But the case garnered media attention: the Washington Post wrote about it at least four times.

sas, 61 U.S. (20 How.) 527, 529 (1857), for the "well-established" principle that a sovereign cannot be sued without its consent. *Thebo*, 66 F. at 375. The *Thebo* court also relied on a public policy reason for the doctrine: protecting the government fisc. *Id.* at 376. For these reasons Congress had "sparingly exercised" its power to authorize suits against tribes, reflecting "the settled policy of the United States not to authorize . . . suits [against tribes] except in a few cases." *Id.* at 375. Moreover, the "settled policy" of tribal immunity extended not just to suits on contracts but to "other causes of action" as well. *Id.* at 376. Because Congress had not authorized suits against the Choctaw Nation or its officials in the legislation establishing the U.S. court in Indian Territory or otherwise, the Choctaws' immunity barred Thebo's lawsuit. *Id.* at 373–74.

In *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908), the court held that the Creek Nation and its principal chief were exempt from suit on a contract. *Id.* at 308. The court explained that tribal immunity, like state immunity, barred both actions for damages and actions seeking prospective relief. *Id.* at 308, 310–11 (citing *In re Ayers*, 123 U.S. at 502, 504). The court cited its earlier decision in *Thebo*, noting that this rule "has been the settled doctrine of the government from the beginning." *Id.* at 308–09. As in *Thebo*, the court relied on the policy of protecting the tribal treasury, arguing that without immunity, the tribes would be "overwhelmed" by litigation, with "disastrous consequences." *Id.*

In 1908 Congress showed its recognition of tribal immunity by expressly authorizing specific suits against six Indian tribes. Act of May 29, 1908, ch. 216, § 2, 35 Stat. 444, 444–45 (Menominee); *id.* § 5, 35 Stat. at 445 (Choctaw); *id.* § 16, 35 Stat. at 451

(Choctaw and Chickasaw); *id.* § 26, 35 Stat. at 457 (Creek); *id.* § 27, 35 Stat. at 457 (Mississippi Choctaw). Section 26 allowed Clarence Turner to sue the Creek Nation for damages resulting from an 1890 incident in which a group of Creek citizens destroyed his fence.

The Court of Claims held against Turner, and this Court affirmed. *Turner v. United States*, 51 Ct. Cl. 125, 155 (1916), *aff'd*, 248 U.S. 354 (1919). The Court recognized that the statute had overridden the tribe's immunity but affirmed for lack of a cause of action. 248 U.S. at 357–59. It first noted that under general law, like "other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace." *Id.* at 357–58. Second, although the 1908 legislation overrode immunity, it did not create any right for him to recover damages for mob violence since "[n]o such liability existed by the general law." *Id.* Turner thus failed to allege a cause of action. *Id.*

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), this Court sustained tribal immunity from suit, but the Court said that its own prior decisions had mistakenly opined that tribal immunity originated in *Turner v. United States*. *Id.* at 756. We agree, though with respect not for the reason the Court stated. As the *Kiowa* Court noted, the *Turner* Court assumed without discussion that tribes had immunity. *Id.* at 757. However, immunity was not at issue because Congress had overridden it by statute. Based on the consistent and uncontradicted decisions of federal courts and actions of Congress, tribal immunity was a settled rule by the time of *Turner*, so it was natural for the Court to assume it. However, the basis for hold-

ing against *Turner*, that he had no cause of action, depended on the governmental character of the Creeks. To that extent, the *Turner* Court expressly recognized tribal sovereignty.

This Court first squarely relied on tribal immunity as a rule of decision in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). The Court stated, "These Indian Nations are exempt from suit without Congressional authorization," citing the Eighth Circuit decisions in *Thebo v. Choctaw Tribe* and *Adams v. Murphy*, as well as *Turner v. United States*. 309 U.S. at 512 & n.11. The Court did not discuss the issue, but the reason for that is apparent from the argument for respondents, which did not contest tribal immunity (as we have noted, all the precedents supported immunity) but argued that "Congress ha[d] consented to an affirmative judgment against the Tribes," and that the issue had been waived by failure to assert it in a former action in Missouri that had gone to judgment without assertion of the defense. *Id.* at 508–09.

Whether tribal immunity could be waived in that manner was a novel issue in the case; it had not been determined in any reported decision about tribal immunity. This Court held that the prior judgment was

> void in so far as it undertakes to fix a credit against the Indian Nations. . . . The Congress has made provision for cross-suits against the Indian Nations by defendants. This provision, however, is applicable only to "any United States court in the Indian Territory." Against this conclusion respondents urge that as the right to file the

> claim against the debtor [in Missouri] was transitory, the right to set up the cross-claim properly followed the main proceeding. The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity.

Id. at 512–13. In other words, the Court held tribal immunity to be jurisdictional, as is immunity of the United States and of the States.

The review above covers all known decisions on tribal immunity prior to World War II, and as noted, tribal immunity was sustained in all of them. In modern times, tribes have undertaken all manner of direct activities, and lawsuits in general have proliferated, so suits against tribes have become common. Since 1977, this Court has upheld immunity six times. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001); *see also Kiowa Tribe*, 523 U.S. at 754–55 (collecting cases). However, the doctrine of governmental immunity has come under attack in modern legal discourse, as reflected in this Court's *Kiowa Tribe* opinions. We address this policy question in part II.C. below.

B. Stripping Immunity in this Action to Saddle the Bay Mills Indian Community with a Damages Judgment Would Be Manifestly Unfair.

As explained above, federal courts have repeatedly affirmed the doctrine of tribal sovereign immunity, while allowing prospective relief against tribal officials. This accords with counterpart rulings for suits against state officers under *Ex parte Young*

and against federal officers.[7] This unbroken line of precedent has guided Indian tribes, States, and Congress in dealings with one another. Under these circumstances, substantial interests of reliance, in accordance with the doctrine of *stare decisis*, weigh against narrowing tribal immunity. *Stare decisis* "carries such persuasive force that [this Court] ha[s] always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996)). This principle has "particular force" in areas where public and private entities have engaged in economic activity based on the Court's prior decisions. *United States v. Maine*, 420 U.S. 515, 527–28 & n.9 (1975).

The Court has applied this principle to protect sovereign immunity; when urged to overrule *Hans v. Louisiana*, it declined. *Welch v. Tex. Dep't of Highways & Public Transp.*, 483 U.S. 468, 478, 486–87 (1987) (plurality opinion); *id.* at 496 (Scalia, J., concurring in part and concurring in the judgment) ("Congress has enacted many statutes . . . on the assumption that States were immune from suits by individuals"). The same conclusion is warranted here; Congress has repeatedly legislated based on a like premise regarding tribes. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991).

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[7] *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584, 589 (1952). In cases covered by the Administrative Procedure Act, plaintiffs can now seek prospective relief against the United States by name. 5 U.S.C. § 702.

C. This Case Presents No Occasion to Review Immunity Policy.

This Court in *Kiowa Tribe* expressed concern about the doctrine of tribal sovereign immunity, noting that "tribes take part in the Nation's commerce" and "[t]ribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians." 523 U.S. at 758. The Court stated that "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* The dissenting Justices similarly criticized the rule of immunity as "unjust," "especially" in view of "tort victims who have no opportunity to negotiate for a waiver of sovereign immunity." *Id.* at 766 (Stevens, J., dissenting).

By invoking the cases of tort victims, the *Kiowa* Court echoed the sentiments that many state courts expressed when, beginning in the late 1950s, they abrogated or limited state tort immunity.[8] However, this Court has sustained the right of States to retain immunity, *Alden v. Maine*, 527 U.S. 706, 754 (1999), and the Court has sustained state immunity in other contexts. *E.g.*, *Seminole Tribe*, 517 U.S. at 47; *Pennhurst State Sch. & Hosp. v.*

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[8] The move to abrogate immunity for state and local governments began in 1957, with *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957). *See* William L. Prosser et al., *Cases and Materials on Torts* 662 (7th ed. 1982). The change reached the majority of jurisdictions by 1977. *See Whitney v. Worcester*, 366 N.E.2d 1210, 1213 (Mass. 1977) ("Forty-five States have modified and at least partly eliminated the defense of immunity in tort actions against municipal corporations. All except thirteen States have abolished or limited the defense in suits against the State.").

Halderman, 465 U.S. 89, 117 (1984). The Court has steadfastly retained the immunity of the United States. *E.g., Navajo Nation v. United States*, 537 U.S. 488, 502–03, 514 (2003). And while it is true that tort immunity has generally been waived, it is often done on terms more restrictive than for private defendants. Thus the Federal Tort Claims Act denies civil juries, 28 U.S.C. § 2402, and a number of state laws have damages caps against governments that do not apply against private defendants. *E.g.*, Colo. Rev. Stat. §§ 24-10-114(1),(4)(a) (2013).

Tribal governments have not ignored the policy issues raised by immunity. State-tribal compacts, on gaming and other matters, often include defined waivers of tribal immunity. *See Cohen's Handbook of Federal Indian Law* §§ 6.05, 12.05[2] & 21.02[2] (2012). Consents to arbitration have been made and enforced. *E.g., C & L Enters.*, 532 U.S. at 414. Tribes may lag the States by a few years, but they are reaching similar adjustments to immunity. Moreover, tribes should have the freedom enjoyed by the United States and the States to waive immunity without juries or with damages limits.

Nor has Congress ignored the issue. Immunity waivers by state and local governments are often limited by the available insurance coverage. The basic self-determination statute for tribes includes a similar provision for waiver determined by insurance. 25 U.S.C. § 450f(c). Secretarial approval of many agreements with tribes is conditioned on waiver or disclosure of immunity. *Id.* § 81(d)(2).

Concerns about tort victims are not applicable in the instant case. Michigan and the Bay Mills Indian Community are parties to a gaming compact, a contract that is the basis for the lawsuit. As noted,

Michigan's original complaint, and its questions presented to this Court, seek only prospective relief that can be obtained by suit against tribal officers. Its amended claim seeking damages presents no important policy issue with which to question governmental immunity. Were Michigan concerned about tort victims, it could have sought protection for them in its compact, as New Mexico did. *See Doe v. Santa Clara Pueblo*, 154 P.3d 644, 647 (N.M. 2007).

CONCLUSION

For the reasons stated, this case should be remanded to the District Court with instructions to proceed against tribal officials under Michigan's amended complaint. The Bay Mills Indian Community should be dismissed based on tribal immunity from suit.

Respectfully Submitted,

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Supreme Court of the United States

STATE OF MICHIGAN,
Petitioner,

v.

BAY MILLS INDIAN COMMUNITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* SEMINOLE TRIBE OF FLORIDA, *ET AL.*, IN SUPPORT OF RESPONDENT

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Kickapoo Traditional Tribe of Texas

Pueblo of Acoma

Absentee Shawnee Tribe

Navajo Nation

Wichita and Affiliated Tribes

Cherokee Nation

Seminole Nation of Oklahoma

Sault Ste. Marie Tribe of Chippewa Indians

Jamestown S'Klallam Tribe

QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction to enjoin activity that violates the Indian Gaming Regulatory Act ("IGRA") but takes place outside of Indian lands.

2. Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. By failing to invoke the dispute resolution clause in its IGRA compact, the State has failed to avail itself of the civil remedy provided by the IGRA in this case, even as it claims none was available outside of federal court	5
A. The dispute resolution provision in the Bay Mills compact provides the State with a mechanism and forum for resolving disagreements or conflicts with the Tribe	5
B. The IGRA contemplates that dispute resolution will be a subject of negotiation between the Tribe and the State, as occurred here	9
II. Dispute resolution provisions and waivers of tribal sovereign immunity are properly and routinely negotiated as part of IGRA compacts, providing states with an array of enforcement options	12
A. Gaming Compact Between the Seminole Tribe of Florida and the State of Florida	13

TABLE OF CONTENTS—Continued

Page

B. Class III Gaming Compact By and Between the Coeur d'Alene Tribe and the State of Idaho 16

C. Tribal-State Compact Between the Pueblo of Acoma and the State of New Mexico 17

D. Gaming Compact between the Navajo Nation and the State of Arizona 18

E. State of Oklahoma Gaming Compact (Absentee Shawnee Tribe, Wichita and Affiliated Tribes, Cherokee Nation, and Seminole Nation of Oklahoma) 20

III. The Court should not interfere with a fairly negotiated agreement in order to give the State the benefit of a bargain it failed to make for itself..... 23

IV. The Court should not disrupt well-settled, investment-backed expectations by reconsidering established law governing tribal sovereign immunity 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page(s)

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)..... 11, 26, 27

Coeur d'Alene Tribe v. State, 842 F. Supp. 1268 (D. Idaho 1994) *aff'd*, 51 F.3d 876 (9th Cir. 1995)..... 16

Comanche Nation v. State of Oklahoma, No. 10-cv-1339-W (W.D. Okla., Dec. 28, 2010), ECF No. 16..... 22

Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999)..... 10, 13, 14, 15

Kickapoo Traditional Tribe of Texas v. State of Texas, No. P-95-CA-66 (W.D. Tex. Apr. 2, 1996)..... 13

Kiowa Tribe v. Manufacturing Technologies, 523 U.S. 751 (1998)..... 2, 25

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State of Michigan v. Bay Mills Indian Community, 695 F.3d 406 (6th Cir. 2012) (No. 11-1413), 2011 WL 3662445 9

TABLE OF AUTHORITIES—Continued

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U.S. Const. amend. XI 11, 14, 20, 21

U.S. Const. art. I, § 8, cl 3 14

U.S. Const. amend. X 20

STATUTES

25 U.S.C. § 81(d) 25

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* 20

Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*

25 U.S.C. § 2701(5) 11

25 U.S.C. § 2702(1) 26

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25 U.S.C. § 2710(d)(1) 5

25 U.S.C. § 2710(d)(1)(C) 9

25 U.S.C. § 2710(d)(3)(A) 10

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25 U.S.C. § 2710(d)(3)(C)(v) 10, 12

25 U.S.C. § 2710(d)(7) 14

25 U.S.C. § 2710(d)(7)(A)(i) 9

25 U.S.C. § 2710(d)(7)(A)(ii) 10, 14

25 U.S.C. §§ 2710(d)(7)(B)(i) - (B)(vii) 9

TABLE OF AUTHORITIES—Continued

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58 Fed. Reg. 5,478 (Feb. 12, 1993)..... 16

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Page(s)

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TABLE OF AUTHORITIES—Continued

Page(s)

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Page(s)

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Paul Spruhan, *Standard Clauses in State-Tribal Agreements: The Navajo Nation Experience*, 47 TULSA L. REV. 503 (2012) .. 28

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Page(s)

S. REP. NO. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 ..... 10, 11, 12

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INTEREST OF *AMICI CURIAE*

Amici Seminole Tribe of Florida, Lytton Rancheria, Coeur d'Alene Tribe, Kickapoo Traditional Tribe of Texas, Pueblo of Acoma, Absentee Shawnee Tribe, Navajo Nation, Wichita and Affiliated Tribes, Cherokee Nation, Seminole Nation of Oklahoma, Sault Ste. Marie Tribe of Chippewa Indians, and Jamestown S'Klallam Tribe are federally recognized Indian tribes that conduct gaming pursuant to the Indian Gaming Regulatory Act ("IGRA"), and that regularly enter into agreements with states and other entities – gaming and non-gaming related – that define the scope of enforcement remedies available to the parties, including sovereign immunity waivers. As such, *amici* tribes have a strong interest in the outcome of this case.[1] *Amici* believe that this brief will aid the Court by clarifying both the central role of Tribal-State compacts in providing enforcement remedies under the IGRA, and the importance of preserving the ability of tribes to negotiate the scope and extent of sovereign immunity waivers when entering into agreements with non-tribal parties.

Like the Bay Mills Indian Community ("Bay Mills" or "Tribe"), several of the *amici* tribes have entered into IGRA Tribal-State compacts, all of which include specific negotiated dispute resolution provisions. The State of Michigan (the "State") bargained for and

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, counsel of record for the Petitioner has consented to the filing of this brief, and written notification of that consent accompanies this filing. The Respondent has filed blanket consent for the filing of amicus curiae briefs in support of either or neither party.

entered into a similar dispute resolution provision in its compact with the Tribe. But rather than invoke that provision, the State seeks to obtain a judicial remedy from this Court – one that would have negative implications for the continued vitality of the dispute resolution provisions in *amici's* existing IGRA compacts. There is no need for this Court to create a remedy that would interfere with a fairly negotiated agreement and give the State the benefit of a bargain it failed to make for itself, especially when doing so would require the Court to make sweeping changes to settled law and threaten the proper functioning of the IGRA. Further, intervention by this Court is particularly inappropriate since the State and the Tribe are currently renegotiating the Compact and the dispute resolution provision is one of the issues on the table.

In addition, contrary to the landmark decisions of this Court in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), and *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998), the State has advanced arguments calling for a drastic revision of the scope of tribal sovereign immunity that, if adopted by this Court, would have significant repercussions well beyond the IGRA context. The State has provided no justification for the Court to make such a sweeping change in long-settled principles of Indian law.

SUMMARY OF ARGUMENT

The State asks this Court to overturn a judgment by the Sixth Circuit Court of Appeals, holding: 1) that the plain language of the IGRA does not supply federal court jurisdiction to hear the State's claim against Bay Mills; and 2) that tribal sovereign immunity bars the claim absent tribal consent. The claim alleges that Bay Mills has violated its IGRA Tribal-State compact

by engaging in Class III gaming outside of Indian lands.

In making its case, the State repeatedly asserts that the failure of this Court to overturn the Sixth Circuit's decision will leave the State without a remedy to address the alleged compact violations absent resort to extreme measures sure to provoke needless acrimony between the Tribe and the State. *See, e.g.*, Pet. Br. at 15, 19, 28. The State asserts that this Court must intervene to provide a judicially created remedy and bridge a supposed gap in the IGRA.

To the contrary, there is no need for this Court to intervene to provide the State with the sort of civil remedy and dispute resolution opportunity it seeks. The State, like the states with which *amici* tribes have compacted under the IGRA, negotiated and agreed to a detailed dispute resolution provision in its compact with Bay Mills – a provision that the State may invoke at any time. The negotiated remedy would require the Tribe, upon final notice from the State, to either cease the conduct to which the State objects or initiate arbitration to resolve the dispute. The State failed to invoke its dispute resolution rights under the compact it negotiated, and the State's brief does not explain why it failed to do so. It seeks instead to persuade the Court that judicial action is desperately needed to curtail the supposedly devastating effects of Bay Mills' assertion of tribal sovereign immunity.

The State's arguments do not reflect the reality of tribal sovereign immunity or account for dispute resolution under negotiated IGRA Class III compacts. Tribes, like other sovereigns, routinely waive their immunity in a wide variety of circumstances, including IGRA compacts. As is also true of other sovereigns, tribes need the ability to define the extent of their

waivers in a manner that allows them to enter into agreements with other willing entities to develop tribal economies while at the same time protecting limited tribal assets and preserving core governmental functions. Consistent with these needs, and after a careful balancing of state and tribal concerns, Congress intentionally elected a cooperative, intergovernmental, and case-by-case regulatory scheme for Class III gaming, utilizing Tribal-State compacts rather than a broad and inflexible grant of jurisdiction to the states.

Were this Court to adopt the State's position, the result would not only contravene the language and intent of the IGRA, but it would also allow the State to circumvent its negotiated agreement with Bay Mills (as memorialized in its Tribal-State compact) and reward the State with the benefit of a bargain that it failed to make for itself at the negotiating table. It would also disrupt the legitimate, settled, and often investment-backed expectations of the parties to countless IGRA compacts, intergovernmental agreements, and commercial contracts involving Indian tribes – all of which assume the validity of settled law governing tribal sovereign immunity. For these reasons, the Court should affirm the Sixth Circuit's ruling.

ARGUMENT

I. By failing to invoke the dispute resolution clause in its IGRA compact, the State has failed to avail itself of the civil remedy provided by the IGRA in this case, even as it claims none was available outside of federal court.

The State claims the Sixth Circuit's approach has left it without a reasonable remedy or alternative to "intrusive individual civil actions and criminal prosecutions" to address any alleged compact violations occurring outside of Indian lands. Pet. Br. 15. This claim is false and ignores the explicit, bargained-for dispute resolution mechanism agreed to in the State's compact with Bay Mills. These kinds of dispute resolution provisions are an intended feature of the IGRA compacting scheme, selected by Congress as the best method of regulating Class III Indian gaming while protecting both state and tribal interests.

A. The dispute resolution provision in the Bay Mills compact provides the State with a mechanism and forum for resolving disagreements or conflicts with the Tribe.

As required by the IGRA, 25 U.S.C. § 2710(d)(1), Bay Mills negotiated and entered into a Tribal-State compact with the State of Michigan as a prerequisite to its conduct of Class III gaming. *See* A Compact Between the Bay Mills Indian Community and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Bay Mills Indian Community, Pet. App. Ex. A, 73a-96a (hereinafter "Compact").[2]

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[2] In the same year, the State entered into essentially the same compact with *amicus* Sault Ste. Marie Tribe of Chippewa Indians.

The Compact governs such topics as which games are authorized to be conducted; standards for the regulation of those games; standards for providers of equipment and supplies; regulations applicable to the sale of alcoholic beverages in gaming facilities; and other topics relevant to the conduct of Class III gaming by Bay Mills.

Section 7 of the Compact is entitled "Dispute Resolution." It begins with a meet-and-confer requirement:

> (A) In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:
>
> (1) The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated and shall specify the factual and legal basis for the alleged noncompliance. The notice shall specifically identify the type of game or games, their location, and the date and time of the alleged noncompliance. Representatives of the State and Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.

Pet. App. 89a. If the State is not satisfied with the outcome of the meeting, it may invoke further rights under the Compact provision:

See 58 Fed. Reg. 63,262 (Nov. 30, 1993) (approving both the Bay Mills and the Sault Ste. Marie compacts). The Sault Ste. Marie compact is available from the National Indian Gaming Commission website at http://www.nigc.gov/Reading_Room/Compacts.aspx.

(2) In the event an allegation by the State is not resolved to the satisfaction of the State within ninety (90) days after service of the notice set forth in Section 7(A)(1), the party may serve upon the office of the tribal Chairperson a notice to cease conduct of the particular game(s) or activities alleged by the State to be in noncompliance. Upon receipt of such notice, the Tribe may elect to stop the game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The Tribe shall act upon one of the foregoing options within thirty (30) days of receipt of notice from the State. Any arbitration under this authority shall be conducted under the Commercial Arbitration rules of the American Arbitration Association except that the arbitrators shall be attorneys who are licensed members of the State Bar of Michigan, or of the bar of another state, in good standing, and will be selected by the State picking one arbitrator, the Tribe a second arbitrator, and the two so chosen shall pick a third arbitrator. If the third arbitrator is not chosen in this manner within ten (10) days after the second arbitrator is picked, the third arbitrator will be chosen in accordance with the rules of the American Arbitration Association. In the event an allegation by the Tribe is not resolved to the satisfaction of the Tribe within ninety (90) days after service of the notice set forth in Section 7(A)(1), the Tribe may invoke arbitration as specified above.

(3) All parties shall bear their own costs of arbitration and attorney fees.

Pet. App. 89a-90a.

Finally, as part of the agreement, the State and Bay Mills preserved certain rights, including each party's sovereign immunity:

> (B) Nothing in Section 7(A) shall be construed to waive, limit or restrict any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity.

Pet. App. 90a. The State, like the Tribe, is protected by the reservation of rights but entitled to the remedies provided in Section 7.

Section 7 applies by its terms to any alleged breach of the Compact. It is also specifically made applicable to the type of breach that the State alleges here – the conduct of Class III gaming by Bay Mills outside of Indian lands – through Section 4 of the Compact.

Section 4 of the Compact provides standards for the regulation of Class III gaming conducted by Bay Mills. Pet. App. 80a-87a. Those standards include the stipulation, set out in subsection (H) of Section 4, that "The Tribe shall not conduct any Class III gaming outside of Indian lands." Pet. App. 83a. Section 4(K) governs administration and enforcement of the standards set forth in Section 4, and provides, in subsubsection (6): "In the event the State believes that the Tribe is not administering and enforcing the regulatory requirements set forth herein, it may invoke the procedures set forth in Section 7 of this Compact." Pet. App. 87a.

Accordingly, the State's Compact with Bay Mills, negotiated and entered into pursuant to the IGRA, provides the State with a civil remedy to resolve this dispute. No separate grant of federal court jurisdiction or waiver of tribal sovereign immunity need be invented for that purpose, and this Court should not feel compelled to rule otherwise simply because the State has failed to exercise its Compact rights.[3]

B. The IGRA contemplates that dispute resolution will be a subject of negotiation between the Tribe and the State, as occurred here.

It is the design and intent of the IGRA that dispute resolution and waivers of sovereign immunity (if considered necessary or desirable by the parties) will be the subject of negotiation between the Tribe and State, as they were here. Class III gaming is lawful under the IGRA only when "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." 25 U.S.C. § 2710(d)(1)(C).[4] Accordingly, any tribe wishing to conduct Class III gaming must "request the State in

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[3] Precisely because the State failed to pursue dispute resolution under Section 7 of the Compact, there is no way of knowing what the result would have been. Given that the Tribe closed its Vanderbilt facility after the district court issued its preliminary injunction in March of 2011, however, there is no reason to believe that the State could not have achieved its desired result through recourse to Section 7. *See* Resp't's Br. at 17 (noting Bay Mills has not reopened the Vanderbilt facility); Appellant's Br. at 1, *State of Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012) (No. 11-1413), 2011 WL 3662445 at *1 (describing closing of the Vanderbilt facility).

[4] Congress included a remedial framework for tribes faced with states that refused to negotiate a Class III gaming compact in good faith. 25 U.S.C. §§ 2710(d)(7)(A)(i) & (B)(i) - (B)(vii).

which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). The IGRA further provides that such Tribal-State compacts may include provisions relating to certain enumerated subjects, specifically including "remedies for breach of contract[.]" 25 U.S.C. § 2710(d)(3)(C)(v). Once a compact has been negotiated, it must be submitted to the Secretary of Interior for review and approval. 25 U.S.C. § 2710(d)(3)(B).

The IGRA's primary civil remedy for Class III compact violations, then, is the remedy elected by the parties in their IGRA Tribal-State compact.[5] It is not, as the State claims, a broad and indiscriminate grant of federal court jurisdiction and implied abrogation of tribal sovereign immunity. *See, e.g., Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1248 (11th Cir. 1999) (citing the "carefully-struck congressional balance of federal, state, and tribal interests and objectives" in the IGRA Class III context and refusing to upset that balance by reading an implied right of action that would allow a state to sue in federal court to enjoin a tribe from conducting allegedly illegal Class III gaming).

The central role of Tribal-State compacts in defining IGRA's remedies for Class III violations is a direct result of Congress' deliberate selection of the compacting system over other, more rigid and intrusive approaches to state regulation of Indian gaming. S. REP. NO. 100-446, at 13-14 (1988), *reprinted in* 1988

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[5] Therefore, though 25 U.S.C. § 2710(d)(7)(A)(ii) provides an additional federal court remedy where an alleged compact violation occurs on Indian lands, the limited scope of that provision does not leave any gaps in enforcement of the statute.

U.S.C.C.A.N. 3071, 3083-84.[6] In the words of the Senate Committee of jurisdiction, "[The IGRA] is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." *Id.* at 6, 3076.

In crafting the IGRA, Congress determined that the Class III compacting approach was more than adequate to protect state interests. Under that system, states have the opportunity to bargain for their preferred method of dispute resolution, and leverage to seek waivers of tribal sovereign immunity if they believe that is necessary for effective dispute resolution. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that state sovereign immunity shields states against suits by Indian tribes seeking to compel the states to negotiate a compact to allow Class III Indian gaming under the IGRA).[7] IGRA therefore

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[6] The Senate Committee report explains that, after "lengthy hearings, negotiations and discussions" balancing state law enforcement concerns against tribal opposition to the imposition of State jurisdiction, "the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of [Class III gaming]." *Id.* at 13, 3083. Under *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), states had no authority to regulate Indian gaming. *See also*, 25 U.S.C. § 2701(5).

[7] It should be noted that the State's leverage in such negotiations has been strengthened by the decision of the Supreme Court in *Seminole Tribe*, where this Court determined that Congress had violated the 11th Amendment in providing for tribal suits

ensures that states have a meaningful opportunity to protect their legitimate interests in the regulation of Class III gaming by Indian tribes, and to define the scope of enforcement of that regulation through intergovernmental negotiations and agreement.

II. Dispute resolution provisions and waivers of tribal sovereign immunity are properly and routinely negotiated as part of IGRA compacts, providing states with an array of enforcement options.

Tribes and states across the United States have used IGRA's Class III provisions to work together to create positive economic benefits for both Indians and non-Indians in their communities. As envisioned by Congress (*see* 25 U.S.C. § 2710(d)(3)(C)(v)), this collaborative effort has included crafting mechanisms to resolve disputes in a manner that reflects the particular circumstances and goals of the parties. These mechanisms may include limited waivers of immunity.

Because the dispute resolution forum and scope of immunity waivers (if any) agreed to in Class III gaming compacts are the result of a bargained-for agreement, they may vary considerably from compact to compact. This flexibility is an intentional feature of the IGRA compacting scheme. *See* S. REP. NO. 100-446, at 14, 3084 ("The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc."). This approach grants states the ability to seek a broad range of dispute resolution options in

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against states which failed to negotiate for a compact in good faith.

their negotiations with tribes, while also strengthening intergovernmental relationships by respecting the dignity and sovereign status of both parties. Indeed, a brief survey of dispute resolution provisions in some of *amici's* gaming compacts illustrates that states have successfully secured a variety of different dispute resolution and immunity waiver agreements to ensure effective enforcement options.[8]

A. Gaming Compact Between the Seminole Tribe of Florida and the State of Florida.

In April 2010, *amicus* Seminole Tribe and the State of Florida agreed to a gaming compact under the IGRA which resolved an impasse that had existed for nearly two decades over the scope of games available to the Tribe. *See* Gaming Compact Between the Seminole Tribe of Florida and the State of Florida (hereinafter "Seminole Compact");[9] 75 Fed. Reg. 38,833 (July 6, 2010) (notice by the Department of the Interior approving the compact). It was ultimately the government-to-government negotiation and agreement facilitated by the IGRA that allowed the parties to work through their respective concerns and reach a

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[8] If a state is unwilling to negotiate a compact, then it does not receive the regulatory benefits of a compact, including a negotiated dispute resolution provision. *See, e.g., Florida v. Seminole Tribe*, 181 F.3d 1237. For example, the State of Texas has refused to negotiate a compact with *amicus* Kickapoo Traditional Tribe of Texas, and successfully asserted its sovereign immunity in a good faith suit filed by the Tribe. Order on Def.'s Mot. to Dismiss, *Kickapoo Traditional Tribe of Texas v. State of Texas*, No. P-95-CA-66 (W.D. Tex. Apr. 2, 1996).

[9] The approved Seminole Compact is available from the National Indian Gaming Commission website at http://www.nigc.gov/Reading_Room/Compacts.aspx.

stable and mutually beneficial arrangement, including a mechanism for future dispute resolution.

Initially, the Tribe and the State had turned to the courts seeking to resolve the dispute between them. However, this Court ruled in 1996 that the Seminole Tribe could not force the State of Florida to negotiate a gaming compact because the State was immune from suit. *Seminole Tribe*, 517 U.S. at 47 ("We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued.") Then, in a subsequent action by the State against the Tribe to close what it alleged were unauthorized games in the absence of a compact, the Eleventh Circuit held that the Tribe was also immune from suit, in part because one of the threshold requirements of the 25 U.S.C. § 2710(d)(7)(A)(ii) abrogation was not met. *Florida v. Seminole Tribe*, 181 F.3d at 1242.[10]

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[10] The Eleventh Circuit noted the equity of the result:

> This case . . . demonstrates the continuing vitality of the venerable maxim that turnabout is fair play. In 1994, we held that the principle of state sovereign immunity embodied in the Eleventh Amendment barred the Seminole Tribe . . . from suing the State of Florida under [the IGRA] for the State's alleged failure to negotiate in good faith regarding the formation of a Tribal-State compact to regulate class III gaming. *See Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994), *aff'd*, 517 U.S. 44 [] (1996). In this case, the State has sued the Tribe . . . for both a declaration that the Tribe is conducting unauthorized class III gaming operations and an injunction preventing such operations in the absence of a Tribal-State compact. The district court granted the Tribe's motion to dismiss on the ground of tribal sovereign immunity . . . . We affirm.

Faced with the inability to force one another into federal court to seek a ruling in their respective favors, the governments of both sovereigns eventually came together and negotiated a gaming agreement on a government-to-government basis, addressing the concerns of both parties. The final agreement incorporated limited waivers of immunity that were carefully crafted to balance the interests of the Tribe and the State, including a mutual waiver of immunity so that both parties would have the ability to enforce their respective rights under the agreement should a meet-and-confer approach fail:

> For purposes of actions based on disputes between the State and the Tribe that arise under this Compact and the enforcement of any judgment resulting therefrom, the Tribe and the State each expressly waives its right to assert sovereign immunity from suit and from enforcement of any ensuing judgment, and further consents to be sued in federal or state court, including the rights of appeal specified above, as the case may be, provided that [certain agreed conditions are satisfied].

Seminole Compact at 45 (Part XIII.D). The conditions limit the waiver to disputes arising under the compact, do not allow claims for money damages except as provided, and explicitly preserve sovereign immunity with respect to third party intervenors. *Id.* The Tribe also agrees to waive its immunity to the same extent as the State for patron tort claims in order to provide a reasonable remedy for the Tribe's patrons, while also protecting the Tribe's governmental assets. *Id.* at 21 (Part VI.D.5).

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181 F.3d at 1239.

In the case of *amicus* Seminole Tribe, then, judicial respect for the sovereign status of both parties ultimately facilitated a balanced and respectful resolution of the issues between the Tribe and the State. The result has been a marked improvement in the Tribal-State relationship, which in turn has facilitated new strides in tribal economic development that benefit not only the Tribe and its citizens, but the State of Florida as a whole.

B. Class III Gaming Compact By and Between the Coeur d'Alene Tribe and the State of Idaho.

In 1992, *amicus* Coeur d'Alene Tribe entered into a Class III gaming compact with the State of Idaho. *See* Class III Gaming Compact By and Between the Coeur d'Alene Tribe and the State of Idaho ("Coeur d'Alene Compact");[11] 58 Fed. Reg. 5,478 (Feb. 12, 1993) (approving the Coeur d'Alene Compact). Article 21 of the Coeur d'Alene Compact governs dispute resolution.[12]

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[11] The approved Coeur d'Alene Compact is available from the National Indian Gaming Commission website at http://www.nigc.gov/Reading_Room/Compacts.aspx.

[12] In addition to the dispute resolution provisions under Article 21, the State and the Tribe negotiated separate provisions, included in Article 6, to govern specific, unresolved disputes between the parties at the time of the compact. Because the parties agreed that these were "ultimately questions of law[,]" they negotiated and agreed to a judicial remedy – specifically, the right of either party to seek declaratory relief in federal district court – to resolve those specific questions. Coeur d'Alene Compact at 10 (Art. 6.4). The Tribe invoked that right and the federal district court entered judgment on the questions. *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268 (D. Idaho 1994) *aff'd*, 51 F.3d 876 (9th Cir. 1995). Several years later, the parties renegotiated and amended Article 6 of the compact. *See*

Article 21 requires the parties to meet within 10 days of service of written notice by either party in an effort to resolve the dispute. If the dispute is not resolved within sixty days, either party may invoke binding arbitration "to enforce or resolve disputes concerning the provisions of [the] Compact." Coeur d'Alene Compact at 27 (Art. 21.2). Further, "[o]nce a party has given notice of intent to pursue binding arbitration and the notice has been sent to the non-complaining party, the matter in controversy may not be litigated in court proceedings." *Id.* at 27-28 (Art. 21.3). Judicial review of the arbitration decision is specifically prohibited by the compact. *Id.* Finally, arbitration decisions are deemed to "have the same effect as if a part of [the] Compact, incorporated in full [t]herein." *Id.*

C. Tribal-State Compact Between the Pueblo of Acoma and the State of New Mexico.

In 2001, *amicus* Pueblo of Acoma was one of several federally recognized tribes to enter into Class III compacts with the State of New Mexico. *See* Tribal-State Class III Gaming Compact (the "Acoma Compact");[13] 66 Fed. Reg. 64,856 (Dec. 14, 2001) (notice of compact approval). Under Section 7 of the Acoma Compact, either party may serve written notice of any alleged noncompliance, identifying the compact

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Amendment, available at: http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/coeurdAleneTribe/coeurdaleneamend12.19.02.pdf; 68 Fed. Reg. 1,068 (Jan. 8, 2003) (approving amendment).

[13] The approved Acoma Compact is available from the National Indian Gaming Commission Website at http://www.nigc.gov/Reading_Room/Compacts.aspx.

provision alleged to have been breached and the factual and legal basis for the allegation. The provision then outlines a procedure that may be invoked if the alleged noncompliance is not resolved within twenty days of the notice. Acoma Compact at 14-15 (§ 7(A)(2)). The provision further identifies rules and procedures for arbitration and provides that the results "shall be final and binding, and shall be enforceable by an action for injunctive or mandatory injunctive relief against the State and the Tribe in any court of competent jurisdiction." *Id.* at 15 (§§ 7(A)(3)-(5)).

In the case of the Acoma Compact, the parties determined that sovereign immunity waivers were not necessary for effective resolution of disputes between the Pueblo and the State.[14] Instead, the parties agreed that, for purposes of arbitration pursuant to the compact, "any action or failure to act on the part of any agent or employee of the State or the Tribe, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this section, occurring after such decision, shall be wholly unauthorized and ultra vires acts, not protected by the sovereign immunity of the State or the Tribe." *Id.*(§ 7(A)(5)).

D. Gaming Compact between the Navajo Nation and the State of Arizona.

Several federally recognized tribes, including *amicus* Navajo Nation, have entered into identical Tribal-State Compacts with the State of Arizona (the

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[14] In a separate provision of the compact, the Pueblo agreed to a limited waiver of sovereign immunity for the resolution of claims by visitors to the Pueblo's gaming facility for bodily injury or property damage. Acoma Compact at 16-18 (§ 8).

"Arizona Compact").[15] *See* 68 Fed. Reg. 5,912 (Feb. 5, 2003) (notice of compact approval). The Arizona Compact includes a relatively lengthy and detailed dispute resolution provision in Section 15 of the compact.

Section 15 begins with a detailed and specific, two-stage meet-and-confer requirement. Arizona Compact at 43 (§ 15(a)). If the parties are unable to resolve the dispute, within 30 days of the original notice either party may request non-binding mediation. *Id.* (§ 15(b)). If at the close of 30 days after the initial notice the dispute has not been resolved through negotiation or mediation, either party may demand binding arbitration. *Id.* at 43-47 (§ 15(c)). The rules preclude the arbitration tribunal from awarding money damages against either party. *Id.* at 47 (§ 15(c)(11)).

In conjunction with arbitration pursuant to the compact provision, either party may seek, in a court of competent jurisdiction, any of the following: (1) preliminary injunctive relief pending the arbitration outcome; (2) entry of judgment upon the award; or (3) injunctive relief to enforce an award. *Id.* at 45 & 47

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[15] The Arizona Tribal-State Compact, along with amendments and appendices, is available from the Arizona Department of Gaming website, at: http://www.azgaming.gov/content/tribal-state-compacts. The model compact is available at http://www.azgaming.gov/content/arizona-tribalstate-compact-2003. In addition, the Navajo Nation has entered into a Tribal-State Compact with the State of New Mexico. *See* 69 Fed. Reg. 2,617 (Jan. 16, 2004) (notice of compact approval). The dispute resolution provision (Section 7) of that compact is similar to the dispute resolution provision inthe Pueblo of Acoma's compact described above. The Navajo Nation – New Mexico compact is available from the National Indian Gaming Commission website at http://www.nigc.gov/ Reading_Room/Compacts.aspx.

(§§ 15(c)(8) & 15(c)(12)). The compact names specific courts of competent jurisdiction for actions by either the Tribe or the State. *Id.* at 47 (§ 15(d)). With regard to sovereign immunity, Section 15(c)(11) provides that "Title 9 of the United States Code (the United States Arbitration Act) and the Rules shall govern the interpretation and enforcement of Section 15(c), but nothing in Section 15(c) shall be interpreted as a waiver of the State's Tenth Amendment or Eleventh Amendment immunity or as a waiver of the Tribe's sovereign immunity." *Id.*

E. State of Oklahoma Gaming Compact (Absentee Shawnee Tribe, Wichita and Affiliated Tribes, Cherokee Nation, and Seminole Nation of Oklahoma).

Like Arizona and other states, Oklahoma has entered into a "model compact" (the "Oklahoma Compact") with several tribes, including *amici* Absentee Shawnee Tribe, Wichita and Affiliated Tribes, Cherokee Nation, and Seminole Nation of Oklahoma.[16] *See* 70 Fed. Reg. 3,942 (Jan. 27, 2005) (approving the Absentee Shawnee Tribe and Cherokee Nation compacts); 71 Fed. Reg. 53,706 (Sept. 12, 2006) (approving the Wichita and Affiliated Tribes compact); 70 Fed. Reg. 21,440 (Apr. 26, 2005) (approving the

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[16] The model Oklahoma Compact is available at the Oklahoma Office of Management and Enterprise Services' Gaming Management Unit website at http://ok.gov/OSF/documents/ModelCompact.pdf. The approved Absentee Shawnee, Wichita and Affiliated Tribes, Cherokee Nation, and Seminole Nation of Oklahoma compacts are available from the National Indian Gaming Commission website at http://www.nigc.gov/Reading_Room/Compacts.aspx. For a full listing of compacted tribes in Oklahoma, see http://www.ok.gov/OSF/Tribal_Gaming/Compacted_Tribes.html.

Seminole Nation of Oklahoma compact). In addition to a meet-and-confer requirement, the Compact includes limited waivers of sovereign immunity for specific purposes and a specific good faith requirement for invoking the clause.

Part 12 of the Oklahoma Compact governs dispute resolution. The State and Tribe agreed to specific waivers of sovereign immunity as part of the arbitration component of the dispute resolution provision, agreeing: "The parties consent to the jurisdiction of such arbitration forum and court for such limited purposes and no other, and each waives immunity with respect thereto." Oklahoma Compact Part 12. Part 12, paragraph 3 further provides:

> Notwithstanding any provision of law, either party to the Compact may bring an action against the other in a federal district court for the de novo review of any arbitration award under paragraph 2 of this Part. The decision of the court shall be subject to appeal. Each of the parties hereto waives immunity and consents to suit therein for such limited purposes, and agrees not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver.

Id. The waivers are limited, however, as follows: "Nothing herein shall be construed to authorize a money judgment other than for damages for failure to comply with an arbitration decision requiring the payment of monies."[17] *Id.* In 2010, Part 12 was

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[17] In addition to the Tribal-State dispute resolution provision discussed in the following paragraphs, the Oklahoma Compact at Part 6(A) effects a limited waiver of tribal sovereign immunity for purposes of judicial review of denials of tort and prize claims filed

invoked to resolve a dispute between *amicus* Wichita and Affiliated Tribes, other tribal signatories to the Oklahoma Compact, and the State regarding the scope of state court jurisdiction under certain compact terms. The parties proceeded to arbitration, and judgment was entered on the award in federal district court. *See* Judgment, *Comanche Nation v. State of Oklahoma*, No. 10-cv-1339-W (W.D. Okla., Dec. 28, 2010), ECF No. 16.

The dispute resolution schemes in the Oklahoma Compact, like the varied dispute resolution provisions in above *amici's* compacts,[18] were calibrated to the needs of the parties and arrived at through government-to-government negotiations.[19] The very existence of these compact provisions undermines the State's assertion that a reversal of the Sixth Circuit's decision is necessary to provide an adequate means of resolving intergovernmental conflicts related to Class III gaming. *See, e.g.*, Pet. Br. 15.

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with the tribal gaming enterprise in accordance with Compact provisions.

[18] Many Tribal-State compacts aside from those to which *amici* tribes are parties also illustrate the range of negotiated dispute resolution mechanisms that states may invoke pursuant to agreements with Class III gaming tribes. Copies of Tribal-State compacts can be viewed on the National Indian Gaming Commission's website, at http://www.nigc.gov/Reading_Room/Compacts.aspx.

[19] Though *amici* Lytton Rancheria and Kickapoo Traditional Tribe of Texas have not been able to obtain Tribal-State gaming compacts under the IGRA, they have entered into numerous commercial and intergovernmental agreements requiring negotiated dispute resolution and sovereign immunity waiver provisions. Like each Tribal-State compact under the IGRA, each agreement is unique, and its provisions must be designed and negotiated to serve the specific needs at hand.

III. The Court should not interfere with a fairly negotiated agreement in order to give the State the benefit of a bargain it failed to make for itself.

Congress, in enacting the IGRA, provided states with limited authority to regulate Indian gaming on Indian lands through the compacting process. That process has provided ample opportunity for states to protect their sovereign interests and ensure opportunities for dispute resolution and enforcement. Like Florida, Idaho, New Mexico, Arizona, and Oklahoma did in their compact negotiations with *amici* and other tribes, Michigan benefitted from opportunities inherent in IGRA's Class III compacting scheme that allowed it to negotiate with Bay Mills for a suitable dispute resolution provision. Compact at § 7, Pet. App. 89a. The State negotiated the same dispute resolution provision with six other tribes in 1993 (including *amicus* Sault Ste. Marie Tribe of Chippewa Indians), four additional tribes in 1998, and again agreed to the same provision in another compact in 2007.[20]

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[20] In addition to the Bay Mills Indian Community, in 1993 the State of Michigan signed Class III Tribal-State compacts with the Grand Traverse Band of Ottawa & Chippewa Indians; the Hannahville Indian Community; the Keweenaw Bay Indian Community; the Lac Vieux Desert Band of Lake Superior Chippewa Indians; the Saginaw Chippewa Indian Tribe; and the Sault Ste. Marie Tribe of Chippewa Indians. In 1998, the State entered into additional compacts with the Little Traverse Bay Bands of Odawa Indians; the Nottawaseppi Huron Band of Potawatomi; the Pokagon Band of Potawatomi Indians; and the Little River Band of Ottawa Indians. The 1993 and 1998 compacts are available on the Michigan Gaming Control Board's website at: https://www.michigan.gov/mgcb/1,1607,7-120-1380_1414_2182—,00.html. In 2007, the State entered into a compact with the Match-E-Be-Nash-She-Wish Band of Pottawatomi

Nevertheless, it is undisputed that the State never invoked that dispute resolution provision. Instead, without any showing of necessity, the State asks this Court to provide it with a different remedy altogether that would overturn settled law of tribal sovereign immunity, and fundamentally alter the foundations upon which countless gaming and non-gaming agreements have been reached between tribes, states, and other entities. The Court should not grant that remedy.

If Michigan is unsatisfied with the current dispute resolution provision in its Compact, it may seek to negotiate a different provision as part of the compact renewal process. In fact, negotiations are currently taking place to renew the compact.[21] The State is no doubt cognizant of the fact that the remedy it seeks in this Court would artificially tip the balance in these negotiations in its favor. The Court should not interfere in these negotiations, but should allow the Parties to determine the most appropriate method of dispute resolution as Congress intended when it adopted the compacting process for Class III gaming under the IGRA.

Indians. That compact is also available at: http://www.michigan.gov/documents/mgcb/Gunlake_Compact_276443_7.pdf.

[21] The Compact, which became effective on November 30, 1993 (*see* 58 Fed. Reg. 63,262 (Nov. 30, 1993)), provides that "At least one year prior to the expiration of twenty (20) years after the Compact becomes effective, and thereafter at least one year prior to the expiration of each subsequent five (5) year period, either party may serve written notice on the other of its right to renegotiate the Compact." Compact § 12(B), Pet. App. 93a.

IV. The Court should not disrupt well-settled, investment-backed expectations by reconsidering established law governing tribal sovereign immunity.

The State further asks this Court to rewrite existing law to allow for the remedy it now seeks. Such a step would disrupt the balance reached in *amici's* and other Tribal-State IGRA compacts, and produce similar effects in numerous other contexts involving Indian tribes and their commercial and inter-governmental partners.

Tribal sovereign immunity has long been recognized as established law. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §7.05 at 636 (Nell Jessup Newton, ed., 2012) [hereinafter, COHEN'S HANDBOOK]. Moreover, Congress has explicitly ratified the doctrine. 25 U.S.C. § 81(d) (prohibiting the Secretary of the Interior from approving any agreement or contract requiring approval under that provision unless it includes reference to "a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe" or otherwise addresses tribal sovereign immunity).[22] As a result,

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[22] The legislative history of this provision shows that, following "extensive hearings on tribal sovereign immunity," Congress declined to legislatively overturn the doctrine, and instead chose to "[build] on an apparent agreement that Indian tribes and their contracting partners are generally best served if questions of immunity are addressed, resolved, or at least disclosed when a contract is executed." S. REP. NO. 106-150, at 11 (1999). The Senate Report also noted, "Any uncertainty about whether tribal

tribal sovereign immunity is a fundamental assumption embedded not only in the deals struck in IGRA Class III gaming compacts across the country, but in countless other commercial contracts, agreements, and arrangements in which tribal governments are involved. Any change to existing law governing tribal sovereign immunity would disrupt the reasonable, settled, and often investment-backed expectations embodied in those arrangements.

The State argues that tribal sovereign immunity is an outdated concept that should be reconsidered due to "developments in tribal commercial activities." Pet. Br. at 38. This view is simplistic and unfounded in its attempt to separate tribal economic success from the governmental interests of Indian tribes and to obscure legitimate modern reliance on tribal sovereign immunity. Unlike assets held by commercial entities, tribal assets are governmental assets that are used to provide services to tribal members. Indeed, Congress has tethered tribal economic development to tribal sovereignty in the IGRA itself: by statutory command, revenues from tribal economic development through gaming must be utilized for specific and limited purposes, including "to fund tribal government operations or programs." 25 U.S.C. § 2710(b)(2)(B)(i).[23] Gaming may often provide "[t]he sole source of revenues for the operation of the tribal governments

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immunity will prevent the enforcement of an agreement with an Indian tribe can be addressed and eliminated through the terms of an agreement with the tribe or by some other means." *Id.* at 7.

[23] Congress also declared that a central purpose of the IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

and the provision of tribal services." *Cabazon*, 480 U.S. at 218-219.

Accordingly, just as state sovereign immunity is invoked to protect the fiscal purse and preserve core governmental functions, existing law preserves the ability of tribes to define the extent of tribal waivers through negotiations. This in turn allows tribes to enter into the agreements necessary to develop their economies, participate in economic ventures, and operate their governments while at the same time protecting their limited tribal assets. The baseline protection afforded by sovereign immunity, therefore, is a core assumption underlying these agreements and the legitimate expectations formed by all parties to them.

Of course, Indian tribes realize that they must work with other governments and with commercial entities in order to succeed in their goals, and that reflexive assertions of tribal sovereign immunity in disputes with third parties may jeopardize those relationships. For this reason, tribes are generally judicious in asserting their immunity and frequently negotiate limited waivers so that legitimate disputes can be resolved by a neutral forum. Nor are non-tribal parties unfairly disadvantaged; as the State itself points out, "a party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe's waiver of sovereign immunity from suit." Pet. Br. 40.

In line with these realities, commercial contracts, intergovernmental agreements, corporate charters, and other tribal business ventures and partnerships throughout the country have been formed in reliance on existing sovereign immunity law. Immunity waivers, where made, have been carefully calibrated

to account for the competing interests at stake in a balanced and effective manner according to the relevant circumstances. Often, significant investments have been made on the basis, at least in part, of the protection and opportunities provided by the preservation or waiver of tribal sovereign immunity. The IGRA compacts discussed in this brief, along with the management agreements, equipment contracts, business arrangements, tribal governmental programs and more that hinge on their success, are but a few examples.[24]

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[24] *See e.g.* COHEN'S HANDBOOK, § 6.05 at 588 (discussing Tribal-State Cooperative Agreements, as well as the role of dispute resolution provisions in their enforcement). Cohen's Handbook notes that, despite the many potential benefits, there are reasons why an Indian tribe (often perceived as the weaker party to the negotiations) might hesitate to enter into an intergovernmental agreement. The expectation that the Tribe will have the ability to negotiate the scope of remedies available should a dispute arise over interpretation or implementation of an agreement could be a significant factor when the Tribe weighs its options in this regard. Cohen's Handbook also notes that Tribal-State Cooperative Agreements can "create a stable legal environment conducive to economic development, [and therefore] may appeal to the common interests of tribes and states." *Id.* at 588-589. This important effect of cooperative agreements is in large part contingent on expectations formed by existing sovereign immunity law that allows each governmental party to protect its legitimate interests while bargaining for appropriate relief. Further, where agreements involve resource sharing, the non-tribal party benefits from expectations that tribal resources will be generally protected. *See id.* (noting that tribal-state agreements "offer both sets of governments the opportunity to coordinate the exercise of authority, share resources, reduce administrative costs," and more). *See also* Paul Spruhan, *Standard Clauses in State-Tribal Agreements: The Navajo Nation Experience*, 47 TULSA L. REV. 503 (2012) (discussing a variety of

The State invites this Court to disrupt the settled expectations of all of the parties involved in these myriad agreements – not to mention tribal expectations in the protection of their governmental resources – by reconsidering established law governing tribal sovereign immunity. However, the State offers no compelling reason for the Court to take that step in light of the contractual rights it has but failed to exercise. Accordingly, the Court should decline to overturn the Sixth Circuit's ruling.

CONCLUSION

The dispute resolution clause in the State's Tribal-State Compact with Bay Mills, entered pursuant to the IGRA and for the express purpose of resolving disputes between the parties, provides the State with a civil remedy for the Class III violation the State alleges in this case. The Court should not interfere with that agreement or with existing, settled law to give the State judicial remedies it did not negotiate for itself. Accordingly, the judgment of the Court of Appeals should be affirmed.

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intergovernmental agreements to which the Navajo Nation is a party).